Law Periodicals
Current

WITHDRAWN
SHL

UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/current-legal-problems_1960_13

CURRENT LEGAL PROBLEMS 1960

VOLUME 13

AUSTRALIA
The Law Book Co. of Australasia Pty Ltd.
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.
The Carswell Company Ltd.
Toronto

INDIA
N. M. Tripathi Private Ltd.
Bombay

NEW ZEALAND
Sweet & Maxwell (N.Z.) Ltd.
Wellington

PAKISTAN
Pakistan Law House
Karachi

CURRENT LEGAL PROBLEMS 1960

Edited by
GEORGE W. KEETON
and
GEORG SCHWARZENBERGER

On behalf of
THE FACULTY OF LAWS
UNIVERSITY COLLEGE, LONDON

VOLUME 13

LONDON
STEVENS & SONS LIMITED
1960

BIBL.
LONDIN.

Published by
Stevens & Sons Limited
of 11 New Fetter Lane
in the City of London
and printed in Great Britain
by The Eastern Press Ltd.
of London and Reading

BIBL.
LONDIN.
UNIV.

All editorial communications should be addressed to:

The Editors,
"CURRENT LEGAL PROBLEMS,"
Faculty of Laws,
University College, London,
Gower Street, London, W.C.1

©
Stevens & Sons Ltd., London
1960

CONTENTS

Preface *page* vii

RETURN TO AUSTIN'S COLLEGE 1

An Address delivered before the Bentham Club by its President, Professor J. L. Montrose, LL.D.
Fellow of University College, London; Dean of the Faculty of Law, Queen's University of Belfast

SOME PROBLEMS IN THE REFORM OF THE LAW OF CHARITIES 22

Professor G. W. Keeton, M.A., LL.D.
Professor of English Law in the University of London;
Head of the Department of Laws, University College, London

THE VARIATION OF TRUSTS 36

D. W. M. Waters, M.A., B.C.L.
Lecturer in Laws, University College, London

SOME ASPECTS OF RECEIVING 60

S. Prevezer, M.A., LL.M.
Lecturer in Laws, University College, London

COMPENSATING THE ACCIDENT VICTIM 85

D. J. PAYNE, M.A., LL.B.
All Souls Reader in English Law, University of Oxford

SOME RECENT DEVELOPMENTS IN THE LAW OF MASTER AND SERVANT 112 *

G. J. Webber, LL.D.
Reader in English Law in the University of London

THE LAW OF DEFAMATION AND FREEDOM OF SPEECH 135 ✓

A. Goodman, M.A., LL.B.(Cantab), LL.M.
Honorary Lecturer in Laws, University College, London

EMERGENCY LEGISLATION IN THE COMMONWEALTH 148

D. C. Holland, M.A.
Lecturer in Laws and Sub-Dean of the Faculty of Laws, University College, London

THE PRESENT IMPORTANCE OF PLEADINGS 171

I. H. Jacob, LL.B.
Master of the Supreme Court;
Honorary Lecturer in Laws, University College, London

REVISION OF THE LAW RELATING TO MENTAL HEALTH 192

B. Hargrove, LL.M.
Lecturer in Laws, University College, London

THE CARRIAGE OF GOODS BY SEA 211

E. R. H. Ivamy, PH.D.
Reader in Law in the University of London

FROM AIR LAW TO SPACE LAW 228

B. Cheng, PH.D., LIC.-EN-DR.
Lecturer in Laws, University College, London

GENTLEMEN'S AGREEMENTS AND THE SECURITY COUNCIL 255

L. C. Green, LL.B.
Lecturer in Laws, University College, London

REFLECTIONS ON THE LAW OF INTERNATIONAL INSTITUTIONS 276

G. Schwarzenberger, PH.D., DR.JUR.
Reader in International Law in the University of London;
Director of Studies, London Institute of World Affairs

Table of Cases 293

Table of Statutes 297

Table of Treaties 299

Index 301

PREFACE

THIS volume of *Current Legal Problems* contains, together with Professor J. L. Montrose's Presidential Address to the Bentham Club, the public lectures which were delivered in the Faculty of Laws of University College, London, during the Session 1959–60.

We wish to thank the contributors, publishers and printers for their co-operation in securing the speedy production of this Volume, and our colleague Dr. Cheng for his painstaking work as Assistant Editor.

THE EDITORS

UNIVERSITY COLLEGE, LONDON,
April, 1960.

RETURN TO AUSTIN'S COLLEGE

J. L. Montrose

The journey on which I invite you to accompany me is to the dream college which John Austin described probably at the end of the first law lecture ever given in these buildings 130 years ago. He drew a picture of what he thought was involved in a " complete legal education " and proclaimed that London possessed peculiar advantages for the setting up of a Law Faculty, where such an education could be given. But in order to commence this journey with you, I have had physically to return to my own college where my ever incomplete legal education was begun, and our spiritual return to Austin's college should perhaps take us first through the fields of his jurisprudence. It is at the end of the two volumes of his *Lectures on Jurisprudence*, or *The Philosophy of Positive Law*, as she sub-titled them, that Sarah Austin placed his introductory lectures on the study of law.

My physical return is in itself a sentimental journey to the University of London of Austin's days. The College Christmas card reminded us that the twin lodges by Gower Street, which formed the only entrance for me as an undergraduate, were there in 1835. My path when a student to the law lecture rooms took me past the statue of John Stuart Mill, and at least once a term I made a pilgrimage to the Science Library where another of my heroes, Jeremy Bentham, then sat in his glass case. John Stuart Mill and Jeremy Bentham were the physical neighbours for a time of John Austin. Both were his spiritual teachers. Though John Stuart Mill sat at Austin's feet at his lectures and later supplied Sarah with the notes which enabled those lectures to be posthumously published, John Austin acknowledged his indebtedness to Mill's *Logic*.

The so-called Austinian theory of law was the dominant doctrine of my student days, and our jurisprudence course was exclusively analytical. It is true that the Quain Professor of Comparative Law of those days was rather an historical jurist, but his was but a part-time chair and he rarely came into contact with undergraduates. The law students of the University were formed into one inter-collegiate society, for there were hardly a hundred in all. But it was a great honour to be chairman of the society which, of course, met in this college, and to introduce as president of our first moot court Lord Atkin, a great friend of the University, who also had a vision of a great Institute of Legal Studies for London.

What great developments have occurred since my student days! There have, of course, been great strides forward in law teaching throughout the United Kingdom since those days just after the First World War. There were giants of earlier generations, Maine and Maitland; Austin whom we honour tonight, and Pollock, who, with his great correspondent Holmes, lived on to overawe my generation. (I still remember that neither the monotone of his delivery nor the tiny size of the audience, in that English lecture theatre where Pollard majestically dramatised the evolution of Parliament, could dull the liberal spirit and scholarly genius of his lecture on the Judge as Man of Valour and Man of Caution.) But despite those giants faculties of law have become substantial parts of universities only since my student days.

Nowhere else have the changes been so great as in this Faculty of Law of " Gower St. U.C.L." I should like to pay my respectful tribute to the great contribution made to legal education here, and through this college to the world, by the Head of our law school, George Keeton. I select two accomplishments for especial mention. The first is the production of *Current Legal Problems*, which, surely, ought in its title to bear a reference to this Faculty of Law. The name " Jeremiads " might, however, prove too elusive an allusion though not necessarily too false a description. Moreover, Jeremy Bentham is perhaps sufficiently commemorated in that other accomplishment, the Bentham Club. The academic lawyer does not seek the glittering prizes open to the professional lawyer: it was no such ambition that led John Austin to the Chair of Jurisprudence here. But he is greatly rewarded and encouraged, as John Austin was not, if his students appreciate the values he has endeavoured to maintain and advance by his teaching. The

Bentham Club has many admirable qualities, but not least is its actuality and potentiality as a contribution to legal scholarship through its support of the Faculty. It is, indeed, a very great honour that has been conferred in electing me President.

AUSTIN'S JURISPRUDENCE

What of Austin's contribution to legal scholarship? It is still largely true, as I have said it was in my own student days, that he is regarded as the great expositor of the imperative theory of law. Indeed, because he is connected both with that theory and with analytical jurisprudence, a popular conception is that analytical jurisprudence is in some way tied to the imperative theory. Thus, Sir Hartley Shawcross in his historic plea at the Nuremberg trials that international law was capable of juristic evolution through the elaboration of fundamental principles of justice, referred to the opposed theory that development could only take place by the enactment of a sovereign, as the doctrine of analytical jurisprudence. That it certainly is not: analytical jurisprudence is not tied to any theory of law, whether of legal institutions as a whole, or of the rule element in law which sometimes goes by the name of lawyer's law. Whether Austin was committed to the imperative theory of law is another question.

It is not easy to describe that theory. Is there any such theory in the abstract, or must one speak of Jones' or Smith's theory? It is, of course, amusing to satirise much jurisprudential discussion, as, indeed, other discussions also in the humanities, as hair-splitting debate about what Jones said about what Smith said about what Brown said, and so on, without ever seeking to criticise the basic theory by reference to some criterion other than some author's literary pronouncement. Buckland has told us how in his student days the study of jurisprudence was conceived largely as pin-pricking Austin. But the desire and ability to state accurately another person's views are precious virtues, not only in scholarship but in citizenship, and essential for toleration and true understanding on which internal and international peace ultimately depend.

One view of Austin's theory of law makes him not the logical analyst of positive law but a positivist philosopher of political government. The state is based on power politics and law is force. In every state there is a concentration of power: law is the instrument whereby this power is exercised; it is the apparatus of coercion for giving effect to the will of the sovereign. Such a doctrine is as old as Plato's Republic, where its exposition is put into the mouth of Thrasymachus, and as modern as the Marxist critique of capitalist society. In Marxist language, it is a " scientific " theory. More precisely, it is a sociological doctrine. This is not the occasion for a refutation of its accuracy: nor even for a full examination of whether it represents Austin's views. I do suggest, however, that the association of such a theory with Austin arose from the dissociation of his analysis of the word " law " from his examination of rules of law. We owe much to Sarah Austin's faith in the value of her husband's work. It is due to her that we have the posthumous publication of his *Lectures*. It may, however, be surmised that it was her influence which led to the publication of his construction of a definition of law under, what I conceive to be, the misleading title of *The Province of Jurisprudence Determined*. It was through this work alone that Austin's views were known to the world for many years. Doubtless a power doctrine of society can be read into some passages from this work. But if the *Province* is read in the context of the *Lectures* the argument, which can be supported from the *Province* itself, is strengthened, that what Austin was seeking to do was to isolate the concept of a legal rule which would serve for the purpose of the particular scope of the task of what he called " general jurisprudence."

As I seek to show later, I do not think Austin fully realised the complexity of the many ideas associated with the word " law," but he did realise how ambiguous and vague ordinary usage was, and he sought to eliminate some of the confusion. It is not surprising that he was not wholly successful: much confusion of the different basic notions of logic, fact and value is still found in the treatment of the subject. I think that when he spoke of " law properly so called," he was merely seeking to emphasise the need for the construction of a concept which would adequately distinguish different things ordinarily denoted by the same word. He does, however, write at times, for example, as if the relation between a rule of law and a sanction were not the result of a stipulative definition, but of an inductive generalisation derived from examination of particular rules. However, Austin contributed a powerful impetus to the task of adequate discrimination of the complex aggregate of law, and his critics have often been no more clear sighted than he in distinguishing the logical differences between the various fields of legal scholarship.

The major task to which Austin sought to devote himself, as appears from his *Lectures*, was that of civilising English law. He saw it as an incoherent assembly of particular rules expressed in a language which, while technical, was largely imprecise, so that lawyers failed to state clearly and use systematically their basic concepts and principles. He contrasted this with the Civil Law. He expressed great admiration for the Roman jurists who seemed to him to possess a genius for logical manipulation of ideas. But it would appear that he looked at Roman law through the eyes of expositors of that system whom he had studied in Bonn during the years of preparation for his professorship. There, it is clear from his library, he came under the influence of Kantian epistemology.

He conceived the task of a philosophy of positive law to be the search for transcendental notions. These were not Platonic transcendent ideas of justice laid up in heaven though mixed with earthly experience in human laws, but the categories of concepts and principles which " logical " analysis may show are presupposed by the actual rules of a legal system or of a number of legal systems. Austin discerned the need for the comparative study of legal systems, but thought that its main value lay in facilitating the task of discovering general concepts and principles. It was this task of logical exploration of Roman law with which the glossators and commentators had been concerned since the birth of European universities with the institutions of legal studies at Bologna in the eleventh century. It had been carried to its culmination with the Pandectists of Germany, who were still dominant at Bonn when Austin was there. It had led to a systematic restatement of Roman law even by those who were opposed to the enactment of a systematic code of law which had been the culmination in France of civil law studies.

It was such a logical exploration and systematisation of English law that Austin conceived as his chief task at the outset of his academic career, and to this he gave the name of general jurisprudence. It was the view of Maitland that little came of it all in the end, and Dicey in 1880 wrote that " Jurisprudence is a word which stinks in the nostrils of the practising barrister." But Maitland's views can be controverted, and it must be remembered that Dicey's remark was basically a criticism of the education of the barrister. Much that was good, and much that I consider bad, did come from Austin's work. I would attribute to his influence the transformation of legal textbooks which Pollock with Oxford filialty ascribed to Maine. They ceased to be largely unorganised collections of abbreviated digests of authorities and became, much more, systematic expositions of principles with illustrations from cases.

I attribute also to Austin the divorce of law from justice, which was for a long time a characteristic of English legal education: this was the unintended consequence of his construction of " general jurisprudence." That it was unintended, I think, can be shown by another task of integration. I have hitherto stressed the need for bringing into relation with each other the content of the *Province* with its definition of law, and the content of the *Lectures* with their elaboration of general jurisprudence. It is also necessary for a balanced presentation of Austin's views to see the place that he ascribed to jurisprudence in the entire field of " a complete legal education."

It is still requisite, however, to comment more particularly on one aspect of Austin's jurisprudence in order to bring out more clearly one interpretation of his definition of a law and one theory of his idea of a just legal order. A leading characteristic of Austin's treatment of jurisprudence is his separation of the categories of *what is* and *what ought to be* the law. For in order to carry out the task of ascertaining the highest generalisations of legal rules by the use of basic concepts, it did not appear necessary to examine the content of the legal rules and to evaluate them in terms of goodness. The task of evaluation was part of what Bentham had called critical jurisprudence, and what Austin called the science of legislation. The only criticism permitted in general jurisprudence was in terms of "logical" consistency.

The aspect of the entire complex of law to be studied was the rule element. Thus, all that was needed was the notion of a legal rule, and for this two defining characteristics were necessary—one of the genus rule and one of the differentia of "legal." Legal rules belonged to the class of prescriptive statements, said Austin: they were general commands. And they were legal rules as opposed to moral rules because they proceeded from some official source, though he was not content to stop at what Bryce called legal sovereignty, but ventured on empirical speculation to suggest a doctrine of political sovereignty. It was, moreover, necessary for Austin's purpose to state the characteristic of a legal rule in terms of a mode of creation rather than of its content or purpose. For a belief that law could be defined *a priori* by reference to such factors led to a doctrine of transcendent, non-empirical, rational law, which was contrary to Austin's theory of justice.

For Austin did have a theory of justice. True, anticipating the cheer word and sneer word language of modern semanticists, he said that the words "just" and "unjust" either meant conformity with or a departure from a set of laws, or had better be signified by a grunt or a groan than by such a mischievous and detestable abuse of language. But what he was criticising in that statement was the use of the words "justice" and "injustice" to express some vague yearning for an ideal, or some emotional disgust for a practice which, even when expressed in lyrical poem or incisive satire, needs to be supplemented by a rational evaluation of evidence.

Austin was a European radical who saw justice in terms of human happiness, to be achieved in a society where order was reconciled with freedom. This was to be attained by the age-old ideal of a government of laws. Laws ought to be made by a legislature accepted by the people on the basis of a science of legislation which established utility as the criterion of goodness of law, and thus directed the scientific use of experience. These enacted laws were to form an integrated system capable of application to the varying situations of life by some objective and deductive method. For Austin, as for Brian King, the ideal judicial function consisted in the logical application of previously clearly formulated rules; his spiritual descendants today are seeking to employ electronic computers in the discharge of that function.

But Austin, unlike Bentham, saw that the limitation of legislative foresight and linguistic symbolism in our world of kaleidoscopic change would always require judges to have some legislative power, and to employ discretion in judicial administration. However, for Austin, as opposed to Brian King and to Kelsen, the tension between the ideal judicial function and the actual judicial process should be so little that it could be resolved by reference to analogy. Austin was quite aware of the defects of analogy, and he devoted some space to its analysis and to the problem of competing analogies. Yet he thought that the problems for courts were, to use Cardozo's language, interstitial, so that the method of analogy, of "widening from precedent to precedent," was adequate. Whether he would have adhered to such a view had his studies continued is doubtful.

Austin failed to establish permanently the terminology whereby "jurisprudence" was limited to the "logical" treatment of rules of positive law. At Oxford Maine was successful in extending its province beyond the analytical to the historical. But it was in this college mainly that "jurisprudence," which Austin had conceived of as a philosophical enterprise, was extended to embrace a pursuit always associated with philosophy, namely, an evaluation of the ends of law. First, before the First World War, Sir John Macdonnell, who was fully aware of the need for sociological inquiry into legal institutions for the purposes of determining whether they were phenomena of power, and of connecting law with society, nevertheless insisted that sociology of law is not enough: "any theory which does not account for the ought" is insufficient. Then Friedmann, after the Second World War, despite his belief in the relativity of ideal notions, brought policy considerations and theory of justice into the field of jurisprudence.

Nevertheless, Austin's terminological recommendation about the use of the word "jurisprudence" played its part, together with the strong professional influence, in largely confining the study of law in British universities to the rationalisation of the products of parliaments and courts. The attitude was one in which natural law expressed " but well meaning sloppiness of thought," and " policy " was a naughty, or still worse, an American word.

It is important, however, to consider whether Austin's own process of so-called logical systematisation of rules of positive law was as free from value judgments as he thought it to be. In my submission, Austinian analysis and synthesis concealed the employment of ideals of justice in the apparent exposition of what the law is. The actual pronouncements of parliaments and courts contain many inconsistencies. Certainly the influence of legal institutions has a strong tendency to produce uniformity, but there are also influences of a contrary character to be found not only in the nature of human personality, but within law itself. The task of systematisation of Austinian jurisprudence both simplifies and idealises. The complexities of actual statements are replaced by generalisations. These, at best, represent but dominant patterns discernible amid the varied pronouncements. More often they are but the writers' views as to what the law ought to be, expressed in language which speaks of principles of what the law is, because they are thought to be presupposed by the particular rules of law. This is indeed a time-honoured practice of juristic legislation, for which Asquith used the name " jurisprudence " and described as Rome's great contribution to the world. It is, indeed, not very different from the practice of much judicial legislation, and has much to commend it in the manner in which it hews close to facts. Nevertheless, it suffers from the defect which Holmes saw: to adapt his language, no generalisation is worth a straw which is not fully supported by the articulation of the premises on which it depends. Or perhaps the language of a recent writer may be adopted in saying that " the visible effect of [legal] education is to enable people to articulate more ingeniously their snap judgments based on prejudice." The actual particulars of legal phenomena may, in accordance with logical doctrine, be classified under many different principles. A purely *a posteriori* process cannot yield a unique principle for systematisation: for that same *a priori* element is involved. The selection of the one principle propounded as the statement of what the law is must be based on some value judgment.

Hitherto, hurrying through the field of Austin's jurisprudence *en route* for his ideal law school, I have not attempted to relieve the dogmatism of my remarks by any illustration. Perhaps I may be permitted to pause for a moment to view recent controversy over the doctrine of precedent against this background of rationalisation and idealisation. I have carefully read the English cases of the last ten years in relation to this doctrine. It has been noteworthy that the phrase *ratio decidendi* occurs with very much greater frequency in that decade than ever before; and nearly always with the significance of referring to the actual reasoning of a judge. It is also noteworthy that judges have often expressed themselves as bound, authoritatively and not persuasively, by the actual reasoning of earlier judges. Many of the cases are concerned with the interpretation of a statute, and judges have dealt with the problem of resolution of ambiguities by seeing how earlier judges dealt with the words of the statute without regard to the facts of earlier cases. But judges have also spoken of being bound by the " decisions " of earlier cases, and, though sometimes it is clear that they are referring to the actual determination by a judge of a specific point of law, this is not always so, and the later judge engages in a task of logical construction and not of linguistic analysis, in stating what was decided in the earlier case. Moreover, judges still " distinguish " and " explain " earlier cases by reference to their facts, though I am not aware of any dictum by a judge in which he referred to what facts were considered material by an earlier court except for the purpose of specifying the true character of the reasoning *secundum subjectam materiam*. The dominant pattern of the past decade, nevertheless, has been that of accepting the actual judicial reasoning as of binding authority.

However, writing much earlier in what is the classical exposition of the problem of determining the *ratio decidendi* of a case, Professor Goodhart preferred as the recommended usage of the phrase *ratio decidendi* the concept of the rule for which a case is of binding authority, and warned against being misled by the term to associate it with "the reason which the judge gives for his decision." Professor Goodhart also rejected the doctrine that what the judge said is of binding authority in so far as the statement is of a general rule of law. But what the judge says are the material facts of the case before him is binding on the later judge whose task it is to construct the *ratio decidendi* (in Goodhart's sense of the term) from the earlier judge's selection of the facts. Before I comment on these matters may I say that this account, while I believe it to be accurate, is only a summary intended but as mnemonic for an historic theory which I assume is already deservedly widely known. Goodhart is, of course, perfectly entitled to adopt a definition of the phrase *ratio decidendi* which does not accord with judicial usage. He stipulates precisely how he proposes to use the term, and his recommendation is in accord with the usage of most jurists. Nevertheless, I prefer judicial usage.

But is Goodhart entitled to say that the doctrine of precedent *is* based on the judge's selection of the material facts? I do not think so: but Goodhart is in no way departing from juristic practice in so doing. What he has done is to rationalise the various judicial pronouncements. He has indeed produced in excellent fashion, with great originality, a brilliant compromise, which some would term synthesis, between the dominant pattern of United States judicial practice which, as Edward Levi has shown, rejects completely the reasoning of the earlier court, and what I consider the dominant pattern of English judicial practice, which Goodhart, in my opinion, believes unduly fetters an English judge. His theory is really a recommendation of what judicial practice should be. I must add that it does not necessarily represent his view of what ideal judicial practice ought to be. In his later writings Goodhart has powerfully argued against the value of a doctrine which accepts the binding force of a single precedent.[1]

---

[1] It is interesting to compare the manner in which Austin in his procedure of generalisation failed to adhere rigorously to the distinction between "is" and "ought" with the manner in which Hohfeld in his scheme of fundamental legal conceptions failed to adhere rigorously to the distinction between empirical fact and legal relation. Just as Austin rightly insisted on the distinction between "is" and "ought," so Hohfeld rightly insisted on the distinction between "fact" and "law." Indeed, this distinction, in the character of presenting the formal character of a legal rule as a logical operation relating antecedent facts to

Austin's College

It is my suggestion that a more accurate account of Austin's views, as expressed in the *Province* and the *Lectures*, may be achieved if those writings are read in the perspective of the curriculum which in the Essay on the Uses of Jurisprudence he sketched for an ideal Law Faculty. It is true that in the *Province* and the *Lectures* there are many passages which show that Austin was a disciple of Bentham: he accepted his theory of utility and he supported his plea for law reform. Like Bentham, he repudiated the doctrine of the Age of Enlightenment which sought to construct legal rules by a process of quasi-mathematical intuition. Logic was not enough even for the intellectual task of understanding law, still less for the pragmatic objective of reform of the law. Experience was a necessary guide. It was the basis of the theory of utility, and it was the foundation of the "political sciences," as Austin termed them, to which Austin also adverted as when he discussed current work in psychology. Nor was history excluded. Austin was aware of Savigny's thesis: and he classified Bentham with Savigny as belonging to a single historical school. Nevertheless, the most explicit statement of the need to examine legal rules, not only in the light of logic but also in the light of the social sciences, is to be found in Austin's plans for legal education. I shall use modern names for the various disciplines. For example, Austin speaks of

legal consequences, is considered by many as Hohfeld's enduring contribution to legal scholarship. But Hohfeld, like Austin, has suffered from a fragmentary treatment of his writings. His essay on a "Vital School of Jurisprudence" has remained unread; his "anatomy of right" has been regarded either as nothing more than a dictionary, or as an apparatus for solving legal problems. It was stated by its author to be a legal chemistry presenting the elements whose various combinations were to be found in all legal situations. His basic error was in failing to see, what Bentham had seen, that his "privilege: no-right" relation was derived not from the consideration of a legal relation, but from attention to the facts involved in a situation where law did not operate. A man's ability to walk on his own land is not a legal relation but a fact. It is possible to envisage a situation in which a man's actions are subject to no rule of law, where he may act without infringing another's rights or involving another's duties. To such an area of freedom from law the word "right" is often applied. But the legal aspects of such a situation are fully described by saying that there is an absence of rights and duties. To create a positive legal relation out of a negation is to indulge in unnecessary hypostatisation, which only attains plausibility through a confusion of fact and law. A more rigorous use of logic, which Hohfeld so rightly insisted was a prerequisite to the effective solution of legal problems, has exposed a flaw in his scheme of legal conceptions.

political sciences, of moral sciences and even of ethics, as he says in the largest sense. But John Stuart Mill has taught us to speak of the social sciences, and Comte of sociology. Again Austin refers to " philosophy of the human mind," where today we usually refer to psychology.

This is not the only change I make. I believe that implicit in Austin's statement are three theses, and I make these explicit, conscious, however, that this attempt at rationalisation may not accurately represent Austin's educational theory.

In the first place, though he pays particular regard to the rule element, Austin sees this as but one aspect of the ultimate problem of the organisation of man in society. One branch of this organisation is the process of government by legal institutions, and rules of law are the specific characteristic of lawyer's law. But to understand fully even lawyer's law, one must also understand what Viscount Kilmuir has happily called politician's law and administrator's law. The science of legislation was an integral part of the curriculum of Austin's college, side by side with jurisprudence and other subjects. Austin's command theory of law and his doctrine of absolute duties emphasise, indeed, public law rather than private law, which has hitherto been the main concern of lawyer's law.

In the second place, though Austin stresses the prescriptive quality of rules of law, he does regard them as instruments for human happiness. Consequently, law is seen by him as an applied science, a technology, for whose understanding and efficient development a knowledge is required of the pure sciences, the basic disciplines, on which law depends. He envisaged these disciplines as twofold: on the one side stood the empirical sciences of man and society, on the other stood logic.

Finally, since there existed a " science " of law, Austin considered that it was properly a university subject, and its study was to be distinguished from purely professional training. The latter should follow on the theoretical study at a university, and should consist in the acquisition of practical skills, and of knowledge of legal rules which were to be directly utilised in practice.

It is clear that Austin placed the highest value on the study of logic. It discharged one of the essential features of a university education in serving as a mental discipline. It was prerequisite to the study of law and ethics and of the social sciences, for without such knowledge the student could not fully realise the problems arising from the ambiguity of language and the character of abstract terms, nor properly appreciate the reasoning processes involved. Austin kept himself abreast of developments in logic, and was aware of Mill's criticism of the syllogistic argument. He cannot be blamed for failing to anticipate the developments of this century. Yet it is necessary to mention two important tasks which modern logic specifies which Austin omits in his utilisation of logic in law.

Austin does advert to " the elliptical form in which the reasoning is expressed " in the moral sciences: but he fails to make explicit the need for the expression of inarticulate premisses in order that they together, with articulated premisses, may be examined as to their logical type. Such an examination may reveal that they fall within the province of, say, economics or ethics so that they may be evaluated in the light of the theories of social science or justice.

Secondly, as has already been observed, while Austin recognises the need for the distinction between what is and what ought to be, he does not rigorously observe it. One of the great merits of linguistic analysis is the rigorous manner in which statements are examined in order to see to what realm of discourse they belong without being misled by grammatical appearances. Austin obviously had great talents for such analysis: for example, he shows that though we speak of rights over things, the logical force of the statement is that of rights against persons.

Nevertheless, without the specific guidance of modern logic, he does fail adequately to distinguish between logic, fact and value in his theory of law. He speaks at times of commands constituting law as if they were historic events. The distinction between token words and type words would have been sufficient to remind him that " rules " need not exist as physical events. He assumes that threats of evil control human actions without adequately considering the psychological and ethical questions involved. He does not fully stress how even the professional lawyer is concerned not only with rules of law but with problems of behaviour, both of officials and citizens, and also with problems of justice, both of actual moral beliefs and of ideal ethical standards.

We must not, however, forget the pioneer character of Austin's work and how little time he was able to devote to it. He may not have the expertise of the modern exponent of logical geography, but he was one of the first explorers of the logic of legal institutions, and he was permitted but few journeys. We cannot complain if he has not left us a complete map of the territory. He shows us what he considers to be the principal features: intrepid and skilful though he was, it is not surprising that he draws for us the main streams and indicates but roughly the mountains which feed them and the lands which they make productive. He concentrates on the rule element, and does not deal fully with the behaviour and ideal elements which also play their part in the complex of law.

Austin's model for his college was the Faculty of Law of German universities. This he did not slavishly follow. As we have already seen, and shall consider further, he did not relegate English law to post-graduate professional studies. Moreover, as is to be expected in so slight a treatment, natural to its introductory function, he does not deal with problems concerned with the teaching of social sciences within a faculty of law. Nor can I fully consider them. However, it may be pointed out that Continental experience since Austin's day is relevant to one problem. Subjects, such as political science and economics, developed there within faculties of law. Thus arose the problem of whether the disciplines of political science and economics were best developed within a faculty of law. It was a negative answer which emerged in the course of time. The President of the University of Pittsburgh, in quite a different connection, has recently said: "There are few institutions which at one time or another, have not permitted a basic disciplinary department to become the captive of a single professional school, with consequent neglect of the needs and interests of the discipline itself." This was broadly the argument used on the Continent for the separation of social sciences from faculties of law. But it is by no means conclusive of all the problems involved. The complete exclusion of social sciences from faculties of law cannot be justified.

It is a triviality perhaps to point out that a university faculty of law is not a professional school, but it is fundamental to assert that the concept of legal institutions as instruments of government, as means of social control for the attainment of social purposes, compels attention to the need for the student of law to be acquainted with the social sciences. When should they be taught? Logic was regarded by Austin as a preparatory subject, so that doubtless it would have been assigned by him to the first year. In our sister faculty, medicine, as the Vice-Chancellor explained to Convocation last year, the pattern has been for the basic pure sciences, such as chemistry and zoology, to be studied in the first year, for the applied sciences, such as biochemistry and anatomy, to be studied in the next two years, and for the student then to proceed to hospital for practical training and further instruction. But there are important differences in the stages of development of the natural sciences which are basic to medicine and the social sciences which are basic to law. It by no means follows, therefore, that the social sciences should be studied in the faculties of law in the first year.[2]

What of theory of justice? I have already said that Austin was much concerned with this; for him the doctrine of utility was no irrelevance. Sarah Austin has told us that " justice and humanity were part of his nature." It is doubtful whether the " political " and " moral sciences " of his day were thought to be as value-free as later scholars would have social sciences. It is, however, in the subject of " legislation " where Austin probably considered that the theory of justice should be most fully studied. It is noteworthy that in his table of a complete legal education we find set out instead of the two subjects of jurisprudence and legislation, which appear in the essay, the names " jurisprudence " and " ethics *stricto sensu*." General jurisprudence was, of course, considered by him an essential prerequisite to the study of legislation.

---

[2] It is not intended by the use of the phrase " social sciences " to suggest that " social psychology " alone, as opposed to psychology in general, was included by Austin in a complete legal education. Whether or not there is a particular subject of " social psychology," it may be urged that the law student should be aware of the inquiries into the existence of psychic factors independent of social environment, of which one aspect is the study of the different responses that individuals make to similar environmental situations. This is in accordance with Michael and Adler's view (in *Crime*, *Law and Social Science*) that the basic sciences for the applied science of criminology are psychology on the one hand, and sociology on the other. Their doctrine extends to all the technologies involved in legal institutions.

We now finally turn to the distinction between the university study of law and professional training. Again, we cannot expect a full discussion of this vital topic from Austin. Nor can I do more than consider one or two aspects. Basically Austin agrees with Lord Douglas, who, rejecting a proposal that courses in air transport should be given at universities, said: " A university is very different from a place to which you go to learn a trade—even if the trade is dignified by being called a profession." But a separation of university study from preparation for a profession is a different thing, and is certainly not an *a priori* necessity. Everything depends on the character of the profession, and on what the profession considers to be requisite preparation.

Academic lawyers join with leaders of the legal profession who have often encouraged the academic study of law as a necessary basis of training for the learned and liberal profession of the law. Nevertheless, Austin, and his successors also, had to deal with two somewhat contradictory types of professional criticism of the academic study of law. In the first place, it is sometimes said that the basic preparation for the profession is a liberal university education, but this is not to be obtained from the study of law. Secondly, it is said that what is required is a grounding in " practical " subjects, and for this purpose subjects like Roman Law, Legal History, Jurisprudence, Comparative and International Law are too academic.

Austin accepted neither type of criticism. In his time academic specialisation had not been carried to the extremes of today, and it was still possible to argue that an undergraduate should not specialise at all. But Austin rightly contended that an attempt at too extensive study would result in a student failing " to know anything well." Along this line of thought I hope for even more selection to be allowed to a law student within the field of legal studies. Austin had also to contend with the doctrine that the classics and mathematics were the best, if not the only vehicles, for the development of mental powers. With regard to classics, Austin's reply was to distinguish the subject of classical literature from its language: the subject-matter was to be found in the various disciplines, its language was best studied at school. With regard to mathematics, Austin denied its superiority either to logic or law as a training of the mind. For him, as for Burke, the study of law did " quicken and invigorate the understanding," and for him its proper academic study would have not a narrowing but a liberal and widening influence. For this reason he hoped to see men not " intending to practice " attending law lectures in the faculty of law. For future lawyers a preliminary arts course was, according to him, quite unnecessary. If a man wants to walk from London to York, there is no need for him first to go to Exeter.

Austin departed from his German model in bringing the detailed study of English law within his college. But, as we have seen, this was not a concession to professional criticism, but a consequence of his belief in its inherent educational value. Both general jurisprudence and particular jurisprudence were within the curriculum. Particular jurisprudence, it will be remembered, was for him the study of the actual rules of legal systems. Within his curriculum he included not only English law, but other legal systems. The study of English law included the study of its history, and the outlines of Roman, Canon and Feudal law were in one place introduced as sources of English law. But the general picture is that of a detailed and critical study of English law which necessarily involved its history and its purpose, accompanied by a dogmatical and historical outline of other systems, including modern Continental systems. Austin firmly believed in the value of his academic curriculum as a preparation for the practice of the law. He devoted particular attention to the practical value of general jurisprudence, not only as a training for legal practice but for the conduct of all public affairs. He assumed that the practical value of legal history and comparative law was self-evident, but what is evident today is a continued need to convert lawyers to such a belief.

It is clear that the curriculum outlined by Austin is far too extensive for an undergraduate course. To some extent the defect may be remedied by giving to the student a choice among the various subjects, provided that a balance is preserved between the various so-called "theoretical" and "practical" branches. In particular, I do not see any need for a university student to traverse more than in broad outline many of the particular topics of English law. I have the highest regard for the academic standards of American law schools, but I consider that their coverage of legal topics imposes far too heavy a task on the student. The average student cannot penetrate very deeply into each subject. Austin should have followed more closely the German model of his day. The post-graduate professional course should include not only a training in professional skills, such as advocacy, drafting and office management, but also the study of all the branches of law with which, in the view of the profession, a practitioner should be acquainted at the outset of his career. But it is not necessary for them all to be studied at the university. Perhaps the profession may require a more ample acquaintance with the branches it considers requisite than a student may have obtained at a university in any introductory outline course. Nevertheless, for the purposes of professional qualification, though not necessarily for the purposes of subsequent professional utilisation, it will not be requisite for the future practitioner to study those branches as thoroughly and critically as the subjects selected for the degree course. His university education will have given the student an awareness of how an outline may be elaborated.

Indeed, it might be questioned whether there need be any teaching, as opposed to study, of professionally required subjects. My answer to this question involves a dream of my own, which I relate before concluding this address. It is five years ago that I suggested as an alternative to fusion of the two branches of the legal profession fusion of their legal education, with consequent easier transfer from one branch to the other. I have subsequently developed that idea. I saw a university degree in law as the basis of a common legal education; but I do not envisage this as the only common part. I envisage future members of the Bar spending some time in a solicitor's office. Nor is this by any means all. The idea of common education for barristers and solicitors is being separately considered by the Bar Council and the Law Society.

My dream is of a joint organ of both branches of the profession administering a scheme of common professional education. The four Inns of Court have demonstrated the fruits of co-operation in the Council of Legal Education: the local law societies work together with the Law Society of England and Wales.

Has not the time come for wider co-operation in some institution of education for lawyers, which might one day become a Royal College of Barristers and Solicitors or a General Legal Council? Such a body need not be restricted to organising the training in professional skills, whether through apprenticeship or through direct instruction, which the Council of Legal Education has shown possible in its practical classes. It might also organise courses of lectures and other classes in the various branches of law. The university study of law must be directed towards its scientific and philosophical basis. The professional study of law may be properly oriented towards practical application, and this without in any way controverting the thesis of Plato, restated by both Bentham and Austin, that theory and practice are not opposed, but interdependent. I envisage such a college not only providing instruction to candidates for the profession, but also " refresher " courses to members of the profession. Nor need such an institution neglect research both into basic legal theory and the efficiency of practical administration of law. For such purposes there may well be co-operation with university faculties in particular projects. But I would also wish for co-operation with academic teachers of law in all aspects of the work of the institute: the governing body of the college might well include representatives of such university teachers.

My journey is almost complete. We have not been able to inspect at all thoroughly all that could have been seen. Perhaps I should have spent more time with International Law. Though Austin did not include it within the class of law " properly so called," he did include classes on the subject with the curriculum of his dream college. Clearly, it could not be excluded from a study concerned with the happiness and welfare of mankind. Can there be any doubt that ultimately this was Austin's concern? In this perspective his theory of law makes it not an instrument of power but a means for the control of power in the interest of "peace and good government." His teaching is directed towards making law more effective for those ends. This is the message of Austin and his fellow jurists which comes down to us through the ages. It is not always delivered in the eloquent language of passion. It is the quiet voice of reason which is chiefly used—the still small voice of logic and justice. But it tells of human drama—of our hopes and fears. The chances are that if we fail to heed it we shall go out with many bangs and many whimpers.

SOME PROBLEMS IN THE REFORM OF THE LAW OF CHARITIES

G. W. Keeton

The law of charities is a jungle, into which the lawyer, whether practitioner or student, ventures at his peril. At any moment, he may stumble over the decaying stumps of obsolescent statutes, or he may find himself trapped in the undergrowth of judicial decisions which cannot be reconciled with any general principles. Almost every part of the law has been frequently the subject of adverse criticism, both legal and lay. Reform, or even rationalisation, still remains the task of a future Parliament, however, and although it was understood that a Bill was being prepared some little time ago, it had not been submitted to the last Parliament before its dissolution.[1] Like so many similar efforts in the past, it was crowded out by other more pressing matters. Even if it had been submitted, it is doubtful whether it would have done more than remedy some of the more pressing defects in the existing law.

It is now seven years since the Committee presided over by Lord Nathan published its comprehensive *Report on the Law and Practice of Charitable Trusts*.[1a] With the exception of one exceedingly narrow and almost incomprehensible change, embodied in the Charitable Trusts (Validation) Act, 1954, on which something more will be said later, nothing has yet been done to give effect to its recommendations. After three years' meditation, however, there was presented to Parliament in July 1955 by the Prime Minister a statement on *Government Policy on Charitable Trusts in England and Wales*,[2] and in August 1959 a Committee presided over by Pritchard J. reported on *The Rating of Charities and Kindred Bodies*.[3] Nor is this all. A short time ago, the Government of Northern Ireland set up a Committee under the chairmanship of

---

[1] It was presented to the House of Lords in February 1960.
[1a] Cmd. 8710 (1952).
[2] Cmd. 9538 (1955).
[3] Cmnd. 831 (1959).

Professor Newark, of Queen's University, Belfast, with terms of reference similar to those of the Nathan Committee. The report of this Committee was published in 1956.[4] There is therefore no lack of documents for the law reformer to peruse, even before he ventures to open the Statute Book and the law reports.

A UNIFYING DEFINITION

It is perhaps to be regretted that so much of the efforts of reformers has in the past been concentrated upon the problem of definition. Definition unquestionably is important and difficult, and both the Nathan and Newark Committees thought it was best left alone or, at most, that the unsatisfactory definition of Lord M'Naghten in *Pemsel's* case should be given statutory force. The Statement on Government Policy accepts this conclusion. It is difficult to see what value could be gained from enacting the *Pemsel* definition. Judges already regard it as of the highest authority. In any case, it is not so much a definition as a classification. In the view of the present writer, a statutory definition could only improve the present position if it enumerated a number of broad classes of trusts as being within the definition of what is charitable. At present, the judicial outlook is still greatly influenced by the miscellaneous list of charitable objects which appeared in the Statute of Charitable Uses of 1601, and which was reproduced in the Mortmain and Charitable Uses Act, 1888. This is undoubtedly a contributory factor in the present entirely piecemeal accumulation of decisions, not based upon any unifying principles, determining whether a purpose is charitable or not. In the long run, there is probably no alternative to the work of rationalisation being undertaken by the appellate courts, although as yet this has not been initiated.

UNCERTAINTY AS A CAUSE OF FAILURE

There are, however, two problems closely connected with that of definition upon which legislation is possible and, in the view of a number of writers, desirable. As a direct result of the pitfalls of definition, the task of the draftsman who is called upon, at one and the same time, to satisfy the desires of a donor of property for charitable purposes, and the intricacies of the law as established by the decisions, is extremely difficult, and too many trusts fail because it is found that they can be construed to include objects not *necessarily* charitable. One notorious illustration of this was the *Diplock* case, in which the House of Lords eventually held[5] that a trust for such "charitable *or* benevolent" purposes as the executors thought fit included non-charitable objects, and the whole gift therefore failed for uncertainty. As the fund had already been distributed to over a hundred hospitals (which were the institutions which the testator had unquestionably intended to benefit) the process of recovery of the fund for the next-of-kin was long and expensive. However, the Diplock trust is by no means the only one which has failed to take effect as a charitable trust in recent years because of the uncertainty and over-technicality of the law, and although the Charitable Trusts (Validation) Act, 1954, giving statutory effect to a recommendation contained in Chapter 12 of the Nathan Report, has removed doubts concerning the status of some trusts which had been regarded as charitable, and which had come into operation before 1952, it has no application at all to trusts coming into operation after that date. On this point, the Nathan Report appears to have accepted the arguments put forward on behalf of the Attorney-General against any further change, and the Statement of Government Policy tersely states: "It is agreed that it is not expedient to attempt to validate imperfect trust instruments coming into existence in the future." This is very greatly to be regretted, for it means that if a problem similar to that which was contained in the *Diplock* case arose in the future, it would be decided in the same way, and no system of law can be regarded as a good one which permits such miscarriages of a donor's intention. Further, it is greatly to be regretted that before coming to any conclusion the Government did not institute a study of New Zealand and Australian legislation upon this important question. The first legislative attempt to provide against defective drafting appeared in section 131 of the Property Law Act, 1928, of the State of Victoria, which was as follows:

---

[4] *Charity Committee Report*, Belfast, Cmnd. 396 (1956).

---

[5] *Chichester Diocesan Board* v. *Simpson* [1944] A.C. 341.

> "1. No trust shall be held to be invalid by reason that some non-charitable and invalid as well as some charitable purpose is or could be deemed to be included in any of the purposes to or for which an application of the trust funds or any part thereof is by such trust directed or allowed, and
>
> "2. Any such trust shall be construed and given effect to in the same manner in all respects as if no application of the trust funds or any part thereof to or for any such non-charitable and invalid purpose had been or should be deemed to have been so directed or allowed."

Provisions in substantially similar terms also appear in section 37D of the Conveyancing Act, 1938, of New South Wales, and in section 2 of the Trusts Amendment Act, 1935, of New Zealand. The provisions, which have the merit of being a good deal more intelligible than our Charitable Trusts (Validation) Act, 1954, have been somewhat frequently before the courts, and have produced remarkably few difficulties in their application. One might have thought that on this topic we might in England have profitably borrowed from the experience of two Commonwealth nations, whose law of charities has the same origin as our own.

THE CY-PRÈS DOCTRINE

A second problem which is closely connected with that of definition is the *cy-près* doctrine, upon which Professor Sheridan and Dr. Delany have recently published a valuable study. It is probably because the doctrine is, for practical purposes, limited to the law of charities that its application by the courts has proved inadequate. There are several theories of its origin, but in all probability it grew out of the early administration of the estates of deceased persons by the Church, and the application of a portion of the deceased's assets to "pious uses." If the deceased had indicated any particular "pious use" to which he wished to apply the assets, the Ordinary would attempt to give effect to his wishes; but even if such a purpose proved impossible to achieve, the fund was still appropriated to pious uses and would be applied *cy-près*. Manifestly the doctrine has changed a good deal since those days, and in so doing it has become both technical and very restricted in its application. It can be applied at two distinct stages: (1) at the establishment of the trust, if the declared object cannot be achieved or is already achieved or there is a surplus after the object has been achieved, and in a few other circumstances; and (2) when the trust is already in operation. In such a case the trustees may apply for the *cy-près* alteration of a charitable scheme, usually on the ground that social circumstances have changed to such an extent since the scheme was established that it is now inappropriate to seek to carry out the actual schemes. A difficulty which has often been experienced in the first type of case arises when, although it cannot be said that the object cannot be achieved, it can only be carried out in an extremely unsatisfactory fashion, whereas a *cy-près* application of the fund would achieve the donor's overriding object more satisfactorily. A good example of a case of this type is *Re Weir Hospital*,[6] where the testator left a house and a sum of money to establish a cottage hospital for the poor of a London borough. The house was unsuitable for this purpose, and the money was quite inadequate to set up the hospital. In the adjoining borough, however, there was already in existence a cottage hospital for the poor of that borough, set up under a will expressed in similar terms, and also very inadequately provided for. Both sets of trustees agreed that it would be most efficient for the *Weir* trustees to sell the house, and to use the entire proceeds to enlarge the existing cottage hospital, using the combined funds for the treatment of the poor of the two boroughs. The Court of Appeal, in a decision which, though legally sound, was socially most unhappy in its consequences, decided that the *Weir* trustees must carry out the actual terms of the will, even if the result was to establish a cottage hospital which would promptly be in financial difficulties.

More recently, the strictness of the *cy-près* doctrine has given rise to a series of decisions upon surplus funds after public appeals, which have produced a situation which verges upon the absurd. Broadly, the facts in all these cases were similar, although minor differences in the form of the appeal have produced differing decisions, and insoluble problems for the trustees concerned. In all of them, there was an appeal for an object which in general estimation was charitable and which, except in one case (the appeal which followed the Gillingham bus disaster), was, in the legal sense, necessarily charitable also. In all of them, either the primary object was achieved, and there was a substantial surplus, or (as was the position where there was an appeal for a hospital) the passing of the National Health Service Act, 1946, had made the establishment of a voluntary hospital in practice, if not in law, impracticable. In all these cases, in addition, money had been raised in a wide variety of ways—by out-and-out gift, by gifts under seven-year covenants, by street collections, and by the organisation of whist-drives, raffles and similar activities. The problem which the trustees asked the court to solve was the ultimate destination of the surplus funds, raised in such a variety of ways. The possible claimants were: (1) the actual donors, (2) the Crown (as represented by the Attorney-General) under the *cy-près* doctrine, for distribution to the next nearest charitable objects, and (3) the Crown, on the assumption that the funds were *bona vacantia*. Before any answer could be given to the question, it was first necessary to decide whether there had been a general charitable intent at the time of the gift. Any answer to this question is obviously artificial, when the gifts were made in response to street collections, raffles, whist-drives and similar activities. In any event, even if the gifts are substantial, and the donor can be immediately ascertained, the question depends to a considerable degree upon the terms of the original appeal. For example, it is easy to see a general charitable intent if the appeal speaks of raising funds for "the provision of a voluntary hospital and similar charitable objects." It is more difficult to see a general charitable intent if the appeal is confined to "the provision of a voluntary hospital" simply. This is by no means the end of the difficulties of construction, however. In one case, members of the Court of Appeal differed in the degree of emphasis to be placed upon the word "voluntary." Was the essence of the appeal the provision of a hospital, or was it rather that the hospital should be voluntary?

---

[6] [1910] 2 Ch. 124.

Assuming that this inquiry shows that there is no general charitable intent, how are the trustees to deal with the surplus funds? Do they return them to the latest contributors, or to the earliest, or *pro rata* to all of them? Ought they to distinguish between those who gave directly, and those who contributed through miscellaneous social activities? Can it be said, for example, that a man who drops a coin in a collecting box in the street, or who contributes it to a raffle, intends finally to part with his money, whilst another who writes a cheque does not? Even if all these problems can be solved, what are the trustees to do with those surplus funds whose donors are now undiscoverable? On the whole, the courts have not viewed with favour the suggestion that they belong to the Crown as *bona vacantia*. At present they remain dormant in the hands of the trustees, or in court, but this is a highly unsatisfactory position. It might have been thought that any fresh legislation on charities would have dealt with this problem by directing that surplus funds raised by public appeal should always be applied *cy-près*. There is, however, no suggestion of this in the Statement of Government Policy, which is vague and unsatisfactory in its approach to this problem. It says:

> "19. . . . Though the *cy-près* doctrine is elastic, it is not clear, without recourse to the court, how far it can be extended. This is dealt with in paragraph 24 below. There are other respects in which some relaxation is needed, particularly in the definition of antecedent circumstances in which schemes may be made. On the other hand, the Government do not in all respects go as far as the [Nathan] Committee, particularly where the initiation of schemes is concerned. They place more emphasis on the individual responsibility and initiative of the charitable trustees and on their duty to carry out the terms of the trust so far as possible."

This is disappointing, and it leaves quite vague to what extent, if at all, the Government is in favour of the relaxation of the *cy-près* doctrine. As it stands, the Government statement would appear to be little more than a reaffirmation of the traditional Chancery view that the donor's intention must be strictly followed, if that is possible—a view which produced the Court of Appeal's decision in *Re Weir Hospital*,[7] and many similar cases. This is the more remarkable since for nearly a century there has been a substantial relaxation of the *cy-près* doctrine in educational and quasi-educational trusts under the Endowed Schools Acts, but here, after several changes of policy in the nineteenth century, Parliament ultimately decided to entrust the power to sanction the *cy-près* modification of trusts within this field to the Ministry of Education. Today, therefore, these very important changes in the functioning of educational trusts are achieved administratively, and they are brought about smoothly and without the difficulty which inevitably accompanies discussions of the extent of this jurisdiction when applications for the *cy-près* modification of other charitable trusts are brought before the courts.

It is therefore a matter for regret that the Statement of Policy does not explain why it has excluded the possibility of entrusting a similar jurisdiction in respect of other charitable trusts to the Charity Commissioners. The reports of the Commissions which investigated the law of charities prior to the passing of the Charitable Trusts Acts, 1853 and 1855, would appear to have contemplated that the Charity Commissioners should exercise such a jurisdiction, but it was excluded for charitable trusts generally by the Act of 1855. Nevertheless, when the Endowed Schools Acts were providing machinery to make available a number of obsolescent charitable trusts for educational purposes, they did for a time provide that the sanctioning body for such *cy-près* modifications should be the Charity Commissioners, although their powers on this matter were transferred to the Board of Education at a later stage. Moreover, in Ireland, the Commissioners for Charitable Gifts and Donations, who were established under nineteenth-century legislation which is the counterpart to the English Charitable Trusts Acts of 1853 and 1855, did receive a *cy-près* jurisdiction, which they still exercise. Some investigation of practice in the

---

[7] [1910] 2 Ch. 124.

Irish Republic on this point would therefore be desirable. Very considerable help was made available by the Irish Commissioners to the Newark Committee in Northern Ireland on this point, although the Newark Committee eventually decided that the advantages of a uniform practice between Northern Ireland and Great Britain outweighed the advantages of following the practice of the Republic.

THE CHARITY COMMISSIONERS

The conclusions embodied in the Statement of Government Policy on the reform of the substantive law of charities are therefore extremely limited, and are on that account disappointing. Having regard to this ultra-cautious approach, it is by no means surprising that the statement proposes no major alteration in the structure of the Charity Commissioners themselves. These have never escaped from the circumscribing conditions of their mid-nineteenth-century origin. The body of Commissioners under the Act of 1853 was to comprise four members, of whom one is by practice a Member of Parliament, but not a Minister. The Act also provided that three of them should be paid, and that at least two of the paid Commissioners should be barristers of not less than twelve years' standing. None of the paid Commissioners was to be eligible for a seat in the House of Commons. Since 1903 there have never been more than two paid Commissioners at any one time. It falls to the lot of the Parliamentary Commissioner to answer questions on charities in the House, and the Nathan Committee notices that three to four questions a year is a fair average, together with a trickle of correspondence which (it is understood) relates primarily to details of administration of charities. The immediate conclusion to be drawn from this is that, having regard to the importance and number of charitable trusts and foundations, the interest shown in the work of the Charity Commissioners could scarcely be less, and it may in part be due to the fact that Members of Parliament are somewhat puzzled by the rather anomalous character of the Commissioners, and that they suspect that the functions of the Charity Commissioners are mainly supervisory, and are therefore not of great importance.

The Nathan Committee, after considering and rejecting suggestions that the functions of the Commissioners should be split up among government departments, eventually recommended that they should be increased, especially in the field of scheme-making, and that there should be a Minister responsible for representing the views of the Commissioners in Parliament and in the Government, and for giving the Commissioners general guidance. The Committee also recommended that the Board should be composed, not of officers of the civil service, nor necessarily of lawyers, but of men and women of standing, selected primarily for their experience in public and charitable affairs. Provided that this composition does include a number of lawyers, since charitable problems (even if the law is reformed) cannot avoid technicality, these two suggestions seem valuable and important. Unhappily, since the Statement of Government Policy does not contemplate anything beyond specific amendments in the existing law, it does not adopt the suggestion of the Committee upon the reconstruction of the Board of Charity Commissioners, although it agrees with the suggestion that a Minister—the Home Secretary—should answer questions on charities in Parliament, and should have power to approve rules and regulations and should also give general guidance to the Commissioners. As a result of this, the Parliamentary Commissioner should no longer be appointed.

Other Problems

On the other hand, it is highly satisfactory to find included in the Statement an acceptance of the proposal of the Nathan Committee that charitable trusts should cease to be subject to the law of mortmain. This has as little relevance to the modern law of charities as the doctrine of superstitious uses (which, though not mentioned, should also be formally abolished). The doctrine of mortmain is a relic from the days, long past, when the accumulation of land, then the chief source of economic wealth, in the hands of powerful corporations, and particularly in the hands of the Church, was resented by the land-owning classes, and was also frowned upon by the Crown, since it greatly reduced the value of feudal dues.

The Pritchard Report has now provided a most valuable review of the position of charities from the standpoint of rating, with important suggestions for their status in the future. Since this problem was examined at length by Mr. Waters last year,[8] and since he intends to return to it now that the Pritchard Report has appeared,[9] it is not necessary for me to do more than note that the Pritchard Committee has decided in favour of a general scale of relief, to the extent of 50 per cent.

REGISTRATION AND AUDIT

The Pritchard Report, however, includes a further suggestion which was also made by the Nathan Committee, but which was treated somewhat hesitantly in the Statement of Government Policy. It has long been a source of uncertainty to those interested in the functioning of charities that no adequate system of recording them exists. This problem is discussed fully in Chapter 4 of the Nathan Report, in which it is noted that legislation (of which an important example is the Charitable Donations Registration Act, 1812) has frequently attempted to provide for registration. The conclusion of the Nathan Committee was that "trustees should be required to send to the Commissioners or to the Ministry, as may be appropriate, basic information about their trusts, whether now existing or coming into existence in the future and to inform them annually of any changes in this information; that they should be personally and severally liable to pay a small fine for failure to do so; and that the Commissioners and the Ministry should compile and keep up-to-date comprehensive classified records for themselves and classified and up-to-date records of local trusts for county councils and county borough councils, all of which records would be open to the public free of charge." This proposal, which aims to place the registration of charitable trusts on a basis somewhat similar to the registration of public companies, with further similarities in the annual recording of information relating to their activities, has an added importance in view of the recommendation of the Pritchard Committee that rating relief should be given only to registered charities, and it also has an importance in respect of exemption from income tax, which charities enjoy.

---

[8] "The Rating of Charitable and Similar Organisations," 12 *Current Legal Problems* (1959), pp. 114–144.

[9] "Report of the Committee on the Rating of Charities and Kindred Bodies," 23 M.L.R. (1960), p. 68.

The approach adopted in the Statement of Government Policy to this question is, however, a cautious one. It accepts the principle that details relating to all charitable trusts with endowments should be recorded with the Charity Commissioners or with the Ministry of Education, and that charitable trustees should be under a legal obligation to supply them, but it rejects the idea of a small statutory penalty for failure to do so, and prefers the sanction of committal for contempt of court, which at present exists, and is practically never used.

Connected with this question is that of the audit of the accounts of charitable trustees, on which both the Nathan Report and the Statement of Policy are silent. At present, there exists no statutory provision requiring a regular audit of accounts of all charitable trusts. It would seem to be desirable to include in any amending Act a requirement for audit, either annually or at two-year intervals, even though this would impose a limited additional financial burden upon administration. Actually, although the Charitable Trusts Acts require charities to send their annual accounts to the Commissioners, there is no penalty, and the requirement is largely ignored.

TRUSTEE INVESTMENTS AND UNIFIED TRUST FUNDS

On the very important question of trustee investments and the possibility of establishing unified trust funds, there appears to be a very wide measure of agreement. Quite independently of the position of charities, the Government has already announced its intention to amend the Trustee Act, 1925, so as to permit trustees to select from a substantially wider range of investments than the present trustee list; and in anticipation of this change, the courts have already shown themselves sympathetic to applications from trustees, whether of private or of charitable trusts, to sanction the insertion of investment clauses into trust instruments extending the range of investments very considerably. Nevertheless, the responsibilities of private and of charitable trustees are not necessarily identical, and the Nathan Committee, after full consideration of this question, eventually recommended that charitable trustees should be permitted to invest in land, if freehold or long leasehold, and, in addition, they should be entitled to invest up to one-half of the trust funds, subject to safeguards, in the debentures, stocks and shares (including equity stocks and shares) of financial, industrial and commercial companies quoted on the London Stock Exchange. In substance, the Government statement is in agreement with this, although in one respect it is prepared to go a step further. It suggests that the Charity Commissioners and the Ministry of Education should have the same powers as the court to permit investment by charitable trustees outside the present range " but, for the guidance of trustees, it would be made clear in general terms what safeguards and conditions they would require before granting wider powers of investment, and how far in suitable cases they would be prepared to widen these powers." Having regard to the special responsibilities of charitable trustees for the preservation of their funds over long periods, this seems a wise precaution.[10]

The Statement of Policy also gives a qualified welcome to the proposals of the Nathan Committee for facilitating the establishment of unified trust funds, where one organisation or set of charitable trustees administers many trust funds. It feels that legislation should make this more generally possible, and if this should be enacted, it will be particularly welcomed by universities, colleges and learned societies, since it will enable important economies in administration to be made.

TRAP FOR THE UNWARY

Even if the proposals contained in the Statement of Government Policy are embodied in legislation, the Bill will have done no more than remove a few absurdities and anachronisms, and have improved the administration of charities in one or two important respects. The existing statute law will still remain over-abundant and over-technical, and the case-law will still leave great uncertainty in the mind of the practitioner, especially upon the question of definition. Further consolidation of legislation will still be needed. The final paragraph of the Statement of Policy touches upon this point, but dismisses it in rather vague terms with the remark that " the way in which the revision is to be undertaken, and the ultimate form of the legislation, are not questions which can be considered from the point of view of charities alone." These remarks could be made with equal truth in respect of important revision of any major branch of English law. It is possible that they reflect the limitations of staff under which the Charity Commissioners work, for the amount of labour involved in a complete consolidation of the Law of Charities into a single, comprehensive statute is very large. Until it is undertaken, however, the Law of Charities will remain a trap for the unwary, and its over-technicality will undoubtedly be the direct reason for the frustration of the intentions of more testators.

---

[10] *Cf.* also the writer's "The Changing Conception of Trusteeship," 3 *Current Legal Problems* (1950), p. 14, at p. 21 *et seq.*

THE VARIATION OF TRUSTS

DONOVAN WATERS

IN the halycon days of 1901 Farwell J., an eminent Chancery judge, gave voice to these words: " I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible."[1] In 1954 these words were still thought by the House of Lords to be fundamental, and yet only five years later, as a result of the passing of the Variation of Trusts Act in 1958, Vaisey J. could say: " As I have said in this court before I am not sure that the Act will not come in very useful in construing trusts because if the court cannot understand trusts it will substitute those it can understand."[2]

THE UTILITY OF A TRUST

These statements are but a reflection of the complete change that has overtaken attitudes and techniques within the law of trusts during the past twenty or thirty years. The time-honoured principles concerning the formation and operation of trusts remain valid, but times and change have come to assault the fundamental principle that once a trust is validly set up the role of the courts is merely to interpret its meaning. Whenever anything more than mere interpretation was called for, the traditional attitude of the courts has been that, if the courts gave relief, it was by way of exception to the general rule. In the last century, however, Parliament was already conferring broader powers upon the courts, and this process has been continued to the present day. Largely through Parliament's intervention, but also through the pressure of trust beneficiaries upon the courts, the trust is no longer measured by the intent of the settlor but by its mere utility. In the light of present conditions does the trust yield all the benefits it might to those who are beneficiaries? That is the question we now ask.

---

[1] *Re Walker* [1901] 1 Ch. 879, at p. 885.

[2] *Re Needler's Will Trusts, The Times*, April 14, 1959.

It was in 1938 that the legislature permitted incursions upon the testator's assets, including any trusts set up by his will, when the will failed to make adequate provision for his surviving spouse and children, and in 1958 the maintained, but divorced, spouse was included among those who might upset the will.[3] Of course, incursion upon a will in favour of dependants and family was permitted in principle by the Romans, but the provisions of the Matrimonial Causes Act, 1950,[4] introduced the courts to a quite revolutionary role. In future the courts were to have power to break or remodel all ante-nuptial and post-nuptial settlements when divorce or a nullity decree had reshaped the interests of the married couple and their children. Legislation merely recognised that the foundation of those settlements was gone, and the Variation of Trusts Act has but carried this revolution to its logical end.

(1) *The effect of taxation*

The factor, however, which has done most to bring about the change of attitude is taxation. Indeed, its influence has been so far-reaching that it has produced a modern law of trusts, which in the techniques employed has little in common with the trusts of the pre-First World War period. The strict settlement, which had so well served the landed gentry of the eighteenth and early nineteenth centuries in their desire to provide for future generations and against their spendthrifts, was already a burden to tenants for life in the late nineteenth century, and after the First World War the effect of taxation was to make its operation disastrous. In the same way disaster came to await the marriage and post-nuptial settlements so popular with nineteenth-century industrialists and commercial entrepreneurs, and once so fitted to provide for the wife and children of the young man who might fail to succeed in business.

Nevertheless, it would be a mistake to imagine that successive Finance Acts are having the effect of eliminating the trust; on the contrary, all the evidence suggests that trust income and capital are in fact increasing. Estate duty[5] and taxation[6] may have made the old forms of settlement less familiar, but in their place have come the settlements to avoid estate duty and taxation. The aim of the settlor is still the same, namely, to provide for his family and dependants, and, so far as is possible, to ensure that no spendthrift wastes the substance, but the finest provision he can probably make is to ensure that during his life income tax and surtax are kept as low as possible, and that on his death estate duty is leviable upon his property to the minimum extent. This means that the settlor must employ deeds of covenant, discretionary settlements and separate settlements *inter vivos* of income and of capital, and as the law stands those are the only recommended settlements.

---

[3] Inheritance (Family Provision) Act, 1938 (see also the Intestates' Estates Act, 1952); Matrimonial Causes (Property and Maintenance) Act, 1958.

[4] s. 25.

If the settlor wishes to employ any other settlement, for example, the protective trusts of the Trustee Act, 1925, s. 33, he must be prepared in an " escape clause " to confer such freedom of action upon his trustees as was almost unthinkable to his parents and grandparents. For small estates the trustees should be empowered to raise and pay capital to the tenant for life, notwithstanding the protective trusts, and for substantial estates there should be an overriding power of appointment in the trustees (with appropriate consents) under which the settlement can be brought to a close at any time. In fact, due to constant changes in taxation legislation, modern conveyancing practice favours in any event the power to wind up a settlement at the end of a period of, say, twenty years, and this has the added advantage of terminating the settlement in the lifetime of the protected life-tenant. In effect, the spendthrift can only now be protected until he has reached years of discretion, unless the settlor is willing to give a completely free hand to his trustees in the form of a discretionary trust.[7]

---

[5] Under the Finance Act, 1894, s. 22, duty is leviable when property " passes " or is " deemed to pass " on the death of a person. See further Wheatcroft, *The Taxation of Gifts and Settlements* (3rd ed., 1958), at p. 19 *et seq*.

[6] The income of the trust is the income of the settlor for income tax and surtax purposes if the settlor or his spouse retains any interest under the trust. See further Wheatcroft, *op. cit.*, at p. 94 *et seq*.

[7] The discretionary trust is now in fact the counterpart of the old marriage settlement; in many ways it is designed to produce similar results. A large class of beneficiaries is adopted in order to delay the " passing " of the capital and so the payment of estate duty. An ultimate gift is inserted to cover the event of

It will be observed, then, that two things are required of the modern settlor; he must be prepared to settle his income before receipt, and his capital in middle age. Over and above this he must allow for every future tax exigency by giving his trustees power to override all the trust provisions, and expect that in any event his trust will probably not exceed twenty years in duration. So far as he is able at the time of creating the settlement, the modern settlor must attempt to avoid estate duty and taxation, and for the future he must delegate to his trustees his part in the game of chess with the Exchequer. Nor is this all. The modern settlor is acutely aware of the decreasing purchasing power of his pound, and of the depressed condition of present trustee investments. If he is wise, he will agree to the trustees having complete freedom of investment, and rely upon his own selection of trustees to ensure that that power will be exercised prudently. He may not like doing this if he remembers 1929, but he will feel he has little alternative if he is to prevent the capital of his trust fund eroding away.

(2) *The fate of the older trusts*

Before 1939, however, many of these later developments were not so foreseeable and many settlors freely employed the old forms: the protective trusts of section 33, the marriage settlement, and the various settlements with successive life interests. It was only after the Second World War that many beneficiaries realised how disastrous those settlements had become, and how urgent it was to break them up. When the beneficiaries were all ascertained, *sui juris*, and capacitated, this could easily be done under the rule in *Saunders* v. *Vautier*,[8] but perhaps still the majority of the settlements in the old forms had beneficiaries who were infants, unborn or unascertained. In these cases there had to be obtained the

---

non-appointment of the trust fund, whether that fund be income or capital. The trustees are then requested, for example, to divide the income equally among the children of the settlor to the exclusion of the other beneficiaries. They are also given power to determine the trust at any time over any part of the fund, and requested to release an equal share among the children on death for the benefit of the child's children. In this way, provided there are always more than two in the class of beneficiaries, no "passing" ever takes place.

[8] (1841) Cr. & Ph. 240.

consent of the court on behalf of the incapacitated, and by way of result, as it later appeared, a considerable volume of such work of rearranging and breaking trusts was handled by judges in chambers. In every case exercising, as they thought, the inherent jurisdiction of the Chancery court, judges of that division gave their consent to bargains and agreements between the beneficiaries dividing up the trust fund in proportion to the beneficiaries' existing interests. And then in 1953 came *Chapman* v. *Chapman*.[9] The inherent jurisdiction of the court, so the Court of Appeal held, had never extended to these cases, or at least only to those cases where there was a bargain between the life-interested parties and the remaindermen, and this conclusion excluded the arrangements which were made as a result of agreement between the beneficiaries of one class only, for example, the children of the life-tenant. But two similar cases heard at the same time survived these objections. *Re Blackwell's Settlement Trusts*,[10] a case like *Chapman* v. *Chapman* of "trust-busting," was successful as a bargain, and *Re Downshire's Settled Estates*[11] had an independent success under section 64 of the Settled Land Act, 1925. In 1954 *Chapman* v. *Chapman* was upheld in the Lords,[12] and on this occasion, though their Lordships disagreed with regard to the exact limits to the inherent jurisdiction, a majority were of the opinion that a bargain was also beyond the powers of the court. They decided, however, that while *Re Blackwell* had been wrongly decided, it was not the subject-matter of appeal and therefore stood—with the warning that it was not to happen again.

INHERENT JURISDICTION IN 1958

The alarm caused by the decision in *Chapman* v. *Chapman* was immediate and vociferous. The steep scale of estate duty charges involved the rapid denuding of trust capital, and the effect of the decision was that only those trusts were affected whose beneficiaries were not all *sui juris* and ascertained. Others could continue to arrange their affairs so as to avoid heavy duties. This reflection underlies the dissenting judgment of Denning L.J., and the injustice of the situation was uppermost in the minds of both a leader-writer in *The Times*[13] and later the Law Reform Committee, to whom in 1957 this problem was referred.[14] And, indeed, when one reflects that those who broke their trusts were also able in the case of life-tenants to lay their hands in a period of inflation upon much-needed capital, an advantage equally sought by life-tenants with infant children, the logic of extending to the courts by statute an unlimited jurisdiction was seemingly undeniable. On this tide of justice and logic the Variation of Trusts Act was carried through the legislature in 1958.

---

[9] [1953] Ch. 218.
[10] *Ibid.*
[11] *Ibid.*
[12] [1954] A.C. 429.

Much has been written of the inherent jurisdiction of the Chancery Division prior to that Act, and *Chapman* v. *Chapman* has been subjected to several analyses in the light of the history of the jurisdiction. In each of them one is led to the conclusion that something had to be done.[15] Counsel for the trustees in *Chapman's* case divided the jurisdiction into four heads, and these were adopted by Lord Morton.[16] Two of these were clearly concerned with the management of the trust property: "(a) cases in which the court has effected changes in the nature of an infant's property, *e.g.*, by directing investments of his personalty in the purchase of freeholds; and (b) cases in which the court has allowed the trustees of settled property to enter into some business transaction which was not authorised by the settlement." Nevertheless, *Re New*[17] is sufficient evidence that exercises of the "emergency," as of the "salvage," jurisdiction, can result in considerable benefit to the beneficial interests. On the other hand, the other two heads clearly affected the quantum of the beneficial interests: "(c) cases in which the court has allowed maintenance out of income which the settlor or testator directed to be accumulated; (d) cases in which the court has approved a compromise on behalf of infants and possible after-born beneficiaries."[18] The third head was explained by Lord Morton as but an exception to the general rule, and a mode of fulfilling the settlor's evident intent.

---

[13] December 6, 1957.

[14] *Sixth Report* (*Court's Power to Sanction Variation of Trusts*), Cmnd. 310 (1957).

[15] See, in particular, Marshall, "Deviations from the Terms of a Trust," 17 M.L.R. (1954), p. 420.

[16] [1954] A.C. 429, at p. 451.

[17] [1901] 2 Ch. 534.

It was the fourth head—compromise—which gave rise to the difference of opinion among the judiciary, and that this difference should have existed was unfortunate. It was indeed unedifying to find Law Lords convicting their brother judges of error in the assumption of a generally practised jurisdiction, disconcerting to witness eminent senior Chancery judges in significant disagreement, and merely confusing when decisions like *Re Trenchard*[19] had to be fitted into each argument simply because they had been acted upon for half a century. But while all these matters were fully considered at the time, little was heard of the noteworthy fact that all the Chancery judges of the Court of Appeal and House of Lords were of agreement that there was no limitless jurisdiction and never had been. No doubt if more of these cases had been heard in open court the development and extent of the jurisdiction at any one time would have been clear, but, if their Lordships were right, the reason for the limited jurisdiction requires thought. The explanation surely lies in the traditional principle of the courts that once a trust is validly set up the role of the courts is merely interpretative. Conversion, salvage and emergency operations are condoned by way of exception to keep the trust property intact. Maintenance is a deduction of the settlor's intent, and compromise of disputed rights may result in a new arrangement of beneficial rights, but the compromise jurisdiction is essentially a derivation of the court's interpretative role, and a role which only the court could play. From time to time judges have stretched a point in consenting to the plea of jurisdiction in a hard case, and no doubt the veil drawn across proceedings in chambers has allowed such assumptions of jurisdiction to take on in time the form of common practice, but such a development would not derogate from the validity of the traditional principle.

---

[18] Under the Lunacy Act, 1890, and the Law of Property Act, 1925, s. 171, judges of the Chancery Division, as judges in lunacy, have jurisdiction to sanction the disposition of a lunatic's property, but prior to the Variation of Trusts Act only to vary a trust in which a lunatic was an interested party if there was a genuine doubt to be compromised. But see *Re C. W. M., 1941* [1951] 2 K.B. 714, where the object of estate duty saving was to the fore. See also *Re C., 1958* [1960] 1 W.L.R. 92.

[19] [1902] 1 Ch. 378. In *Chapman* v. *Chapman* [1954] A.C. 429, at p. 463, Lord Simonds explained *Re Trenchard* as " no more than the sanctioning by the court of a purchase by the trustees of the widow's rights." In *Re Forster's Settlement* [1954] 1 W.L.R. 1450, at p. 1453, Harman J. was " puzzled " by these words, " which seem to suggest that there is some general power in the court to sanction a re-arrangement of the beneficial interests, and this is the very thing which the House declined to allow except in what are called salvage cases." He therefore ignored the words, and *Re Trenchard*, and solely considered the application of the salvage exception to the case in hand.

The sweeping away in the Variation of Trusts Act of the limited jurisdiction has swept away with it this traditional principle, and launched the courts upon an uncharted ocean where the only criterion is the immediate functional value of the trust—its mere utility to the beneficiaries.

STATUTORY JURISDICTION IN 1958

A further feature of the *Chapman-Blackwell-Downshire* actions in the Court of Appeal was that section 57 of the Trustee Act, 1925, and section 64 of the Settled Land Act were fully discussed. Neither of these sections was considered by the Lords in *Chapman's* case, and both sections are specifically retained by the Variation of Trusts Act.[20] How far do these sections derogate from the traditional principle of pre-1958?

(1) *Section 57 of the Trustee Act, 1925*

In the case of section 57 the answer is very little. Section 57 empowers the court, where it thinks it "expedient," to sanction an act, unauthorised by the trust instrument, which the trustees desire to carry out in the management or administration of the trust property. Most of the occasions upon which the section has been exercised have again taken place in chambers, but the reported cases in open court have reiterated that the section merely enables the court to authorise specific dealings with the trust property where the dealing is expedient, though the inherent jurisdiction could not be invoked on grounds of emergency, salvage, or that the settlor could not reasonably have foreseen the eventuality. In *Chapman's* case the Court of Appeal emphasised Wynn-Parry J.'s earlier remark that "it was no part of the legislative aim to disturb the rule that the court will not rewrite a trust, or to add to such exceptions to that rule as had already found their way into the inherent jurisdiction."[21] But, if, as Roxburgh J. thought, the legislature had not expressly restricted section 57 to administrative action because the line between such action and trust rewriting cannot precisely be drawn, the courts have had little success in their own efforts to draw a line.

---

[20] Law of Property Act, 1925, s. 171, is also specifically retained (s. 1 (6)).

In two cases, where the court allowed trustees to advance capital in order that tenants for life might discharge themselves of incumbrances, beneficial rights were so affected that possible beneficiaries under discretionary trusts were overlooked in the orders of the court.[22] The only explanation the Court of Appeal in *Chapman's* case could offer was that the orders were made either *per incuriam* or because the interests overlooked were negligible. And in *Re Forster's Settlement*,[23] after *Chapman* v. *Chapman*, Harman J. permitted the trustees to advance capital and so purchase the life-tenant's interests. The object of the order sought was estate duty saving, and the result of the order was that remainder interests were accelerated and the trust broken. Harman J. admitted, however, to having "the gravest doubt," and was only able to confer the power because this was "not an ordinary case."[24]

All one can say of this section is that, while the general rule of the court not to rewrite a trust has been maintained, the result has been to blur the limits of this jurisdiction in the same way as with the inherent jurisdiction. To invoke the section in any future appeal to the courts may well be to invite failure.[25]

---

[21] [1953] Ch. 218, at p. 248. S. 81 of the New South Wales Trustee Act, 1925 (the counterpart of s. 57), contains even wider language, but the courts have placed a similarly narrow construction on the section. See *Ku-Ring-Gai Municipal Council* v. *Att.-Gen.* (1953) 19 L.G.R. 105.

[22] *Re Salting* [1932] 2 Ch. 57; *Re Mair* [1935] Ch. 562.

[23] [1954] 1 W.L.R. 1450.

[24] *Ibid.* at pp. 1456, 1457.

[25] s. 53 of the Trustee Act, 1925, was not invoked in *Chapman* v. *Chapman*. It appears to do no more than reduce to statutory form the inherent jurisdiction of the court in matters of maintenance, particularising and perhaps widening slightly in paras. (*a*) and (*b*).

(2) *Section 64 of the Settled Land Act, 1925*

Prior to the hearing of *Re Downshire's Settled Estates* in the Court of Appeal it was supposed that section 64[26] of the Settled Land Act, 1925, had the same limitation to administrative matters. In *Re Downshire* at first instance Roxburgh J. was able to discover this limitation of subsection (1) in the language of subsection (2) which refers to "practical steps" of an "administrative character." Moreover, subsection (1) referred to those things capable of being effected by the tenant for life. The Court of Appeal disagreed. The language of sections 57 and 64 was materially dissimilar, and the natural meaning of the word "transaction," taken in conjunction with all the meanings of that word as defined in subsection (2), was to suggest that the tenant for life might be authorised to do those things under section 64 which could not be sanctioned for trustees under section 57 or the inherent jurisdiction.

The path to this conclusion was not without its devious turns. The scheme for which sanction was sought in *Re Downshire* concerned personalty which in the same settlement formed part of the trust property together with the settled land. Under the section the transaction must affect or concern the settled land "or any other land," and may be "for the benefit of the settled land, or any part thereof, or the persons interested under the settlement." These disjunctives led the court to say[27]: "In our judgment, the test imported by this last qualification is satisfied by transactions indirectly, as well as directly, operating upon the settled land (or other land), provided that in the former case [the case in point] the effect is real and substantial by ordinary common-sense standards as distinct from that which is oblique or remote and merely incidental."

Two points stem from this statement. The first is that this conclusion of the Court of Appeal, reversing Roxburgh J., has not been considered by the Lords, and the second is that any application to the court in connection with a scheme "indirectly" affecting settled land may well meet failure in the elusive distinction between the real and the oblique, the substantial and the ancillary. This is a distinction upon which the courts may differ from the applicants, and from themselves on appeal. Moreover, neither this section nor section 57 applies to a settlement within the Settled Land Act, 1925, where the settlement totally comprises capital moneys.

---

[26] "(1) Any transaction affecting or concerning the settled land, or any part thereof, or any other land (not being a transaction otherwise authorised by this Act, or by the settlement) which in the opinion of the court would be for the benefit of the settled land, or any part thereof, or the persons interested under the settlement, may, under an order of the court, be effected by a tenant for life, if it is one which could have been validly effected by an absolute owner."

[27] [1953] Ch. 218, at p. 253.

Therefore, though it is possible for the courts to sanction under section 64 a release by the tenant for life of his interest in return for a compensating sum from the capital, with the corollary of accelerated remainder interests, the jurisdiction remains doubtful, and, apart from this doubt, its application is highly restricted.[28]

THE VARIATION OF TRUSTS ACT

This Act was passed to deal with the immediate needs of beneficiaries who are either anxious to minimise estate-duty payments or taxation, or are in need of capital as a result of inflation. And, since these needs could not be met within existing inherent or statutory powers never designed to meet them (unless statutory language happened to be sufficiently broad), the Act had to be widely drawn. Section 1 (1) is in fact so widely drawn that it appears to be practically limitless; it not only covers the ground of all existing inherent and statutory jurisdiction,[29] but appears to introduce the court into every stage of the existence and extinction of a trust, howsoever arising. It is an unparalleled extension of the powers of the courts, and creates in the law of trusts a complete reversal of Farwell J.'s statement of 1901. Indeed, it might truly be said that to permit the court to sanction substantive variations in beneficial interests may mean that the court thereby becomes an agent for the beneficiaries, and the trustee a shadow. A trust is no longer, for example, the holding of property by A for the benefit of B on terms laid down by C, but the holding of property by A for the benefit (as far as considered desirable by the court) of B on terms laid down by C or by the court.[30]

---

[28] Under the Matrimonial Causes Act, 1950, s. 25, the court may make orders "with reference to the application of the whole or any part of the property settled either for the benefit of" the children of the marriage or the parties thereto. Davies J., in *Thomson* v. *Thomson* [1954] P. 384, had no doubt that this empowers the court to sanction variations of trusts for the purpose of estate duty saving.

[29] The Act applies to trusts of realty or personalty, and appears to include settlements under the Settled Land Act, 1925, where the whole of the property is in the form of capital moneys. There is one qualification, however. Under ss. 57 and 64 the court can make orders, and override the dissent of any beneficiary. The 1958 Act merely gives the court a power to assent to proposed arrangements, and does not permit the court to override the dissent of any capacitated beneficiary. There is, however, some judicial difference of opinion as to the effect of the court's approval of an arrangement. In *Re Joseph's Will Trusts* [1959] 1 W.L.R. 1019, Vaisey J. followed an earlier unreported decision of Lord Jenkins that a subsequent act of the parties is required in order to put into effect the court's approval of the arrangement. More recently in *Re Hambledon's Will Trusts* [1960] 1 W.L.R. 82, Wynn-Parry J. has disagreed with this

By permitting the courts to rewrite trusts, the legislature might be said merely to have enabled the courts to apply the rule in *Saunders* v. *Vautier* to any trust and at any stage of its existence, but the 1958 Act surely goes further. If the beneficiaries are all adult and capacitated, they can agree under the rule in *Saunders* v. *Vautier* to bring the trust to a close. During the subsistence of the trust, however, they cannot compel the trustees to act at their command,[31] and, should the trustees act beyond their powers, it is only through the common consent by the beneficiaries to the breach that the trustees are protected from an action for breach of trust. The implication of the present Act, on the other hand, is that the trust is now fully recognised as no more than an adjustable machinery serving the best interests of the owners of the trust property—the *cestuis que trust.* And therein lies the final and total rejection of the sanctity of the settlor's intent.

The Act gives the courts a discretionary power to sanction any arrangement varying or revoking all or any of the trusts, or enlarging the management powers of the trustees,[32] and this power

---

conclusion, holding that if the court's approval is given " the trusts are *ipso facto* altered, and the trustees are bound thereafter to give effect to the arrangement." (At p. 85.)

[30] A view advanced concerning the New Zealand Trustee Act, 1956; see (1958) 34 N.Z.L.Rev. 214.

[31] *Re Brockbank* [1948] Ch. 206.

[32] As yet there has been no reported case known to the writer where the enlargement of the powers of trustees (other than the power of investment) has been sought under this Act. The restriction to " management " cannot be of any real significance in view of the power in the court to sanction variation or revocation.

can be exercised on behalf of four categories of persons. Infants and those otherwise incapacitated (for example, lunatics); persons, ascertained or not, who will take in the future under a class or description (for example, the children of X, a bachelor, or the next-of-kin of Y, a living person); persons unborn; and, finally, any persons taking under a discretionary trust where the preceding protected life interest has not failed or determined. The intention of the Act is that persons who are ascertained and *sui juris* shall give their consent to any arrangement, and it is for this reason that section 1 (1) (*b*) expressly excepts any person who, at the date of the application to the court, would qualify under the particular class or description.[33] A limitation the Act therefore puts upon itself is that the court cannot assent on behalf of an adult beneficiary who cannot be traced and who is a member of a class or within a description. At this point it is interesting to observe that the only other similar provision to the English Act of 1958 known to the writer, namely, section 64 (2) of the New Zealand Trustee Act, 1956, refers to persons "unborn or unascertained or unknown . . . or . . . under a disability." There has been as yet no reported litigation upon this section, so that the significance of "unknown" remains open, but it may possibly include those beneficiaries who cannot be traced, and, since the exercise of its jurisdiction by the English court is discretionary, one would have thought that in any event this would have been a wise inclusion in the English Act.[34] The only adult persons on behalf of whom the English court may assent are the beneficiaries under a discretionary trust dependent upon a protected life interest.

In the exercise of this almost unlimited jurisdiction the court is required to have but one criterion—the "benefit" of the persons on behalf of whom sanction is given.[35] Elsewhere, the present writer has attempted to show that that word is now fully satisfied by evidence of estate duty or tax saving,[36] and there seems no other objection, save the general discretion in the court, to the sanctioning of an arrangement whose only object is the saving of estate duty or tax, and where the beneficial interests are not prejudiced or noticeably altered.[37] Indeed, apart from the cases involving investment clauses, there have been only one or possibly two reported cases[38] where estate-duty or tax-saving considerations were not primary or very much to the fore.

---

[33] This was made clear by the Solicitor-General during the Committee stage of the Bill; December 18, 1957: *Parl.Deb.*, *Official Report*, House of Commons, Standing Committee C, cols. 4, 5.

[34] *e.g.*, to X for life, remainder to any child or children of X equally for life, remainder as X shall by deed or will appoint. X has appointed to herself; she is elderly, and her only child (adult and sane) is abroad and cannot be traced. Under the 1958 Act the court would seem to have no jurisdiction to consent on behalf of the child.

[35] s. 1 (1).

(1) *Protective trusts*

The typical situation here is that the life-tenant has income surplus to requirements, and desires to surrender his interest, thus accelerating the remainder interests. The remaindermen are normally the life-tenant's children or next-of-kin, and, provided the life-tenant lives a further* five years after the surrender of his interest, no duty is payable on the life-tenant's death. Sometimes an additional incentive to revoke the trust is that the remaindermen need capital to educate their own children or set them up in life. In the alternative, the life-tenant is elderly, unmarried and wishes to have a capital sum which he can invest in an annuity for himself. As things are, he will probably gain a larger income thereby than under the protected life interest.

In at least eight of the nineteen cases reported to date orders have been sought to revoke such a trust and for the above reasons, so that chief interest in each case now surrounds the courts' attitude towards "benefit." It was the recommendation of the Law Reform Committee that the interests of beneficiaries under the discretionary trust while the protected life interest remains in existence were "too shadowy,"[39] and that therefore the court should not need to consider any "benefit" accruing to them. Now, while the proviso to section 1 (1) of the Act puts this recommendation into effect, in most of the applications under the Act the courts have tended to look to the age of the protected life-tenant, and to the number of infants in the discretionary class, before excluding considerations of benefit. If the life-tenant is under forty-five, for example, and there are infant children, both in existence and possibly to come, there has to be some reasonable provision for them in the proposed scheme. In *Re Poole's Settlement Trusts*[40] counsel pointed out that before the Act, when such trusts were broken up by the parties and the trustees covered the possibility of a later action for breach by insuring against the subsequent birth into the class of new lives, such insurance provision was for a small sum, often barely more than nominal. Nevertheless, Roxburgh J. insisted upon a substantial provision before he would sanction revocation. On the other hand, most proposed schemes require the parties to take some risk that certain eventualities (for example, death within five years) will not occur, and the courts have consequently been prepared to sanction schemes where the risks are balanced between those who are adult, and those in minority, unborn, or unascertained. In *Re Cohen's Will Trusts*,[41] where revocation was sanctioned, the second generation remaindermen took capital sums under the arrangement. If any of them died before the sometime protected life-tenant, however, the capital sums accorded to such persons would be subject to estate duty, and the children of any such remaindermen would suffer accordingly. On this occasion Danckwerts J. thought that, if the adults were prepared to take that risk, he would also take it on behalf of the infants, the unascertained, and the unborn.

---

[36] Waters, "The 'New' Power of Advancement," 22 *The Conveyancer* (N.S.) (1958), p. 413.

[37] This has been doubted. See [1958] B.T.R. 235, at p. 242.

[38] The object of the applicant and protected life-tenant in *Re Steed's Will Trusts* [1959] 1 All E.R. 609 was absolute ownership. In *Re Falkner's Settlement Trusts*, *The Times*, March 3, 1959, the applicant and settlor was a protected life-tenant, and the settlement was improvident. Vaisey J. permitted revocation, hoping, as he said, that the case would not set a precedent. The object of the application is not made clear. *Re Falkner* is the only reported case to date where the court has made an order under the Variation of Trusts Act when the inherent jurisdiction of the court to set aside a voidable settlement might have been employed. See further on the inherent jurisdiction, Keeton, *Law of Trusts* (7th ed., 1957), at p. 111 *et seq.*

* 7yrs.

Later, in *Re Turner's Will Trusts*,[42] a similar problem arose, but this involved an even greater risk to the infant and unborn grandchildren. As part of the bargain the protected life-tenant also released a power of appointment which she might have exercised in favour of the grandchildren, though they were not possible donees in default of appointment. The second generation remaindermen proposed to settle upon themselves and the grandchildren the capital sums which in each case came to them, but for tax- and duty-saving purposes they were empowered to revoke the new settlements when they and the trustees in each case desired so to do. It was only "on balance" that Danckwerts J. saw benefit as accruing to the grandchildren from such an arrangement.

---

[39] Cmnd. 310 (1957), para. 19.

[40] [1959] 2 All E.R. 340.

[41] [1959] 1 W.L.R. 865; [1959] 3 All E.R. 523. In this case, however, grandchildren had an independent interest, since the children could appoint to the grandchildren, and the grandchildren took in default of appointment.

[42] [1959] 3 W.L.R. 498; [1959] 2 All E.R. 689.

May the court consider the benefit of the adult beneficiaries who do not come within paragraphs (*a*) to (*d*)? The impression conveyed by the cases is that though the courts are not required to consider this, they may yet exercise their general discretion against an unsuitable proposal. In *Re Steed's Will Trusts*[43] the trustees of a protective trust did not agree with the proposal and did not surrender their discretion to the court. This moved Harman J. to fall back on the basic rule that the courts will not override trustees who are anxious to continue exercising their discretions, and he refused to exercise his own discretion under the Act in favour of the proposal put forward by the protected life-tenant, even though she was unmarried, past child-bearing, and had exercised her power of appointment over the remainder interest in favour of herself. Moreover, in *Re Oakes' Settlement Trusts*,[44] though there was no objection from the trustees, the settlor/applicant, who was the life-tenant, argued that when the court had looked after the interests of those classes for whose benefit the trust was created, it was not concerned with anyone else, and that the applicant could be treated for all purposes as her own mistress, to do what she liked with the trust property. Vaisey J. explained, however, that the jurisdiction of the court was discretionary, and he was "not at all sure that

---

[43] [1959] Ch. 354; [1959] 1 All E.R. 609. See now [1960] 1 All E.R. 487 (C.A.), upholding Harman J.

[44] [1959] 1 W.L.R. 502; [1959] 2 All E.R. 47. But see, in particular, *The Times*, February 19, 1959. The language of Evershed M.R. in *Re Steed's Will Trusts* is much more reserved, however.

[the applicant's argument] was right."[45] He therefore adjourned the action so that affidavit evidence might be produced to show why the applicant wished to vary the trust. On the resumed hearing his Lordship laid down that such evidence must always be produced in applications under the Act.

Only one reported application to the court has so far been rejected, and that was in *Re Steed's Will Trusts.* Harman J.'s primary reason was the desire not to override the trustees' discretion, but he also based his rejection of the proposal upon what can only be described as an odd interpretation of the word "arrangement," which appears in section 1 (1) of the Act. "It seems to me," he said,[46] "that the 'arrangement' to which the Act refers must be something arranged between A, B and C, whoever they may be." It is difficult to understand, however, why one man should not "arrange" his affairs when he puts them in a different order. The Act assumes that, except with protective trusts, the consent of all beneficiaries who are *sui juris* will be obtained before an application to the court is made,[47] and Harman J. adds that trustees must also consent, at least in those cases where they have a discretionary role. But to require that the scheme itself, the "arrangement," must be the product of two or more persons, unnecessarily equates "arrangement" with agreement, and it is a matter for satisfaction that, though the Court of Appeal has recently dismissed the appeal of the applicant, it has dissented from Harman J.'s limitation upon the meaning of "arrangement."[48]

---

[45] *The Times*, February 19, 1959.

[46] [1959] Ch. 354, at p. 361; [1959] 1 All E.R. 609, at p. 612. The All E.R. (at p. 612) make it clear that in his Lordship's view an "arrangement" can be made between the only beneficiary capable of assenting and the trustees. But suppose the trustees have no discretionary role, and are merely being obstinate. Has the court no jurisdiction? In differing from Harman J.'s interpretation of "arrangement," and in underlining that the trustees' approval is not required, the Court of Appeal (see above, n. 43) now appears to have removed this doubt.

[47] "The Bill proceeds on the view that if there be a person alive and kicking, healthy and strong, *compos mentis*, *sui juris*, . . . it is not right that he should not do his consenting for himself"; the Solicitor-General, *supra*, n. 33, col. 4.

[48] See *supra*, n. 43. During the debate in Standing Committee C it was mentioned by a member that the word "arrangement" is "universally disliked by conveyancers, particularly in the Chancery Division." See *supra*, n. 33, col. 5. The New Zealand Act (s. 64 (2)) refers to a "rearrangement." See further the editorial note to *Re Basden's Settlement Trusts* [1943] 2 All E.R. 11, for the usual employment of the word "arrange."

On the other hand, in *Re Turner's Will Trusts* Danckwerts J. attached a natural meaning to the words " any person " in section 1 (1) (*d*). His attention was drawn to the fact that, while paragraphs (*b*) and (*c*) specifically refer to unborn or unascertained persons, this is not so with paragraph (*d*). Therefore, it was argued, when dealing with a discretionary trust which is to arise on the cessation of a protected life interest, the court can only overlook the benefit of persons who are not within those descriptions. Danckwerts J., however, had no doubt that paragraph (*d*) has section 33 of the Trustee Act, 1925, in mind, and that therefore all unborn and unascertained persons are included within the paragraph, and can be overlooked by the court.

(2) *Exclusion of the settlor*

If new beneficial interests arise on the death of a person, when the death occurs estate duty is leviable on the capital supporting those interests. Indeed, it was the desire of Sir Robert and Lady Chapman to exclude mention of their own lives from settlements in favour of their grandchildren, which gave rise to the *locus classicus*. Subsequently,[49] and under the new Act, the court consented to replace a discretionary and selective maintenance trust to cease on the settlors' deaths with an accumulation trust as set out in section 31 of the Trustee Act, 1925. Under this section the maintenance is not selective, and terminates on the beneficiary obtaining his majority. In this way estate duty is avoided.[50]

Similarly, and particularly since the Finance Act, 1958,[51] if the settlor or any spouse of his retains any interest under a trust, the income of the trust is the settlor's income for the purposes of income tax and surtax. To date three cases have been reported where variation was sought solely in order to avoid such taxation.[52] Indeed, in *Re Clitheroe's Settlement Trusts*[52] Danckwerts J. said that the very fact that the provisions of the Finance Act, 1958, were designed to defeat *Inland Revenue Commissioners* v. *Saunders*,[53] a decision of the Lords in the taxpayer's favour, moved him to look favourably upon the scheme whereas he might not otherwise have done so. Consequently, he agreed to the exclusion from benefit under the trust of any future wife of the settlor.[54]

---

[49] *Re Chapman's Settlement Trusts* (*No.* 2) [1959] 1 W.L.R. 372; [1959] 2 All E.R. 47.

[50] See also *Re Needler's Settlement Trusts*, *The Times*, April 11, 1959.

[51] ss. 21, 22.

[52] *Re Needler's Settlement Trusts*; *Re Roberts' Settlement Trusts*, *The Times*, March 14, 1959; and *Re Clitheroe's Settlement Trusts* [1959] 1 W.L.R. 1159; [1959] 3 All E.R. 789.

(3) *Investment clauses*

By application to the courts under the scheme-making powers charitable trusts have for some years been able to secure a widening of their investment clauses, while the only avenue to the same advantage open to private trusts has been section 57 of the Trustee Act, 1925. Courts in this country under that section, and in Australia and New Zealand under counterpart powers,[55] have refused to permit other than named investments, and it was not until the decision of Danckwerts J. in 1958 in *Re Shipwrecked Fishermen*[56] that the courts have sanctioned under section 57 a general power to invest from time to time in a specified range of investments. As a result the scope of section 57 in this respect remains doubtful, and one of the by-products of the conferment upon the courts of comprehensive powers under the 1958 Act has been a number of applications to obtain sanction to widened or completely new investment clauses. In an early group of cases, heard together,[57] Harman J. expressed his pleasure at being able to avoid, under the 1958 Act, the doubts of section 57, and later in *Re Byng's Will Trusts*[58] Vaisey J. declared it now "safer" to proceed under section 1 of the new Act.[59] This is now general practice.

[53] [1958] A.C. 285.

[54] It was also made clear in *Re Clitheroe* that discretionary trusts arising other than under protective trusts are not within para. (*d*) of s. 1 (1) of the Act, and that therefore the court must ensure that the arrangement is to the genuine benefit of all the discretionary trust beneficiaries.

[55] Australia: Victoria; Trustee Act, 1953, s. 63 (1), and *Boyd* v. *Cowell* [1952] V.L.R. 288. New South Wales; Trustee Act, 1925, s. 81, which includes additional jurisdiction over the "adjustment of the respective rights of the beneficiaries," and see *Riddle* v. *Riddle* (1952) 85 C.L.R. 202. New Zealand: Trustee Act, 1956, s. 64 (1), and *Re Allison, decd.* [1958] N.Z.L.R. 678.

[56] [1959] Ch. 220.

[57] [1959] 1 W.L.R. 375; [1959] 2 All E.R. 47.

[58] *Ibid.*

[59] The 1958 Act gives jurisdiction where the proposal is "for the benefit" of beneficiaries; s. 57 only where it is "expedient."

However, the recent issue of the Government White Paper on the subject of trustee investments foreshadows legislation to widen considerably the investment powers of the Trustee Act, 1925, s. 1.[60] In view of this impending legislation, in applications before him for wider investment powers, Roxburgh J. has been making mere interim orders,[61] and, though this has not become general practice,[62] there can be little doubt that after the enactment of such legislation the courts will be most reluctant to entertain, under the Variation of Trusts Act, applications for even wider investment powers than the future measure permits.[63]

By way of general comment on the past, however, it must be said that the width of investments permitted by the courts has differed quite considerably from case to case. There has been variation in the requirements of commercial companies who are to be eligible, variation in the stock exchanges upon which trustees may deal, and variation in the sanctioning of unit trust investments and of deferred stocks and shares. Moreover, pressure has been put upon the courts to permit even wider investment clauses if one trustee is a trust corporation or the Public Trustee. In *Re Thomas' Will Trusts*,[64] however, Vaisey J. refused to make the order conditional on a bank remaining a trustee since he thought banks ought not to be in a privileged position, while in *Re Brocklehurst's Will Trusts*[65] Danckwerts J. ordered that should the Public Trustee cease to be a trustee of the trust in question the extended powers of investment should not be exercisable without some further order of the court.[66]

---

[60] *Powers of Investment of Trustees in Great Britain*, Cmnd. 915 (1959).

[61] See *Re Royal Naval and Royal Marine Children's Homes* [1959] 1 W.L.R. 755, and his Lordship's comments in *Re Tyndale's Will Trusts*, *The Times*, January 15, 1960.

[62] See *Re Payne's Settlement*, *The Times*, *ibid.*, where Cross J. thought that it was unsatisfactory for there to be a sudden change at an arbitrary moment in the trustees' powers of investment.

[63] Though investment powers, expertly advised and sanctioned by the courts in the immediate past, have been noticeably wider than those outlined in the White Paper, and the White Paper does not restrict the discretion of the court. The view has been expressed that the 1958 Act permits the court to confer upon specialised trustees wider powers of investment than would be available to trustees in general under a new statutory investment list on the lines of the White Paper. On this view there is no necessary connection between the White Paper policy and the court's jurisdiction under the 1958 Act.

[64] *The Times*, March 14, 1959.

[65] *Ibid.* April 30, 1959. In *Re Cain's Will Trusts*, *The Times*, May 1, 1959, Danckwerts J. refused "to fetter the power of appointing new trustees," though a situation might result where both trustees were life-tenants and so able by use of a wide investment clause to keep up their income at the expense of capital.

The conclusion is that, as successive governments have refused to recognise the gravity of the trustee investment situation, so by way of result courts of law have been compelled to make what are essentially economic and policy decisions. In *Riddle* v. *Riddle*[67] in 1952 Fullager J. made this very point in the Australian High Court. Indeed, whatever the merits of the White Paper recommendations and ultimate legislation, Parliament should surely cease to think of the courts as an avenue for the correction of its own investment-policy inactivity or mistakes.

PROBLEMS CREATED BY THE VARIATION OF TRUSTS ACT

Is it a matter for concern that, apart from countering the effects of inflation, the prime, or even sole, object of so many applications to the court has been the avoidance of estate duty and taxation? The Law Reform Committee[68] dismissed fears of the possibility of any such development on two grounds. First, no judge would be likely to sanction any scheme which, " as a citizen and a taxpayer, he would not think it right to enter into with regard to his own property," and, secondly, it was unfair and has not been legislative policy to subject one section of the community to the full rigours of taxation which others could legally avoid. In general, Parliament has accepted these arguments, and subsequently various courts of the Chancery Division have expressed pleasure at being able to sanction such schemes.[69] The odd thing is, however, that applications to the court for this purpose ought only to concern settlements drafted in earlier days; the modern draftsman knows that an " escape clause " is vital, and, if he does not give the trustees or tenant for life such overriding powers, his only justification may be the rare, obstinate settlor. In these circumstances, it is difficult to see why the necessarily sweeping jurisdiction conferred by this Act should be available to trusts set up after *Chapman* v. *Chapman*. Conveyancers were thereby warned of the effect of drafting mistakes, and on an earlier occasion, following the disastrous drafting error of the Diplock will, Parliament merely approved remedial legislation for those trusts set up before a specific date.[70] Criticism of such legislation in the Diplock circumstances may be justified, but the Variation of Trusts Act exposes the courts to a perpetual game of chess with the Exchequer—and merely, it may be, to serve the folly of future settlors[71] or the errors of their draftsmen. An example is ready at hand. If a future Finance Act lays down that a " passing " shall occur on the death of every beneficiary under a discretionary trust, there is likely to be a consequent and considerable volume of work in the Chancery Division. This will include the older trusts and recently created trusts unwisely drawn. Moreover, if the court is asked to vary rather than revoke a trust, has it to speculate on future turns of fiscal legislation?

---

[66] In *Re Lacy's Settlement Trusts*, *The Times*, January 16, 1960, Buckley J. made a similar order, but with the proviso that the existing trust corporation should remain a trustee.

[67] (1952) 85 C.L.R. 202, at p. 230. The court is not " the proper place," and should not " take upon itself to say that an investment in the A Co., Ltd., is sound, whereas an investment in the B Co., Ltd., is not."

[68] Cmnd. 310 (1957), paras. 15 and 16.

[69] See, *e.g.*, *Re Clitheroe's Settlement Trusts*, *supra*, n. 52.

To my mind the first argument of the Law Reform Committee misses this criticism entirely. The concern is not for the wisdom of the judge, but whether, sitting in Her Majesty's courts, this activity is appropriate to his role. And the second argument, too, has a somewhat hollow ring in view of the nature of the Act. Unless the trust property is less than £500 in amount or value, variation or revocation is only available to those trusts which can afford an application to the High Court,[72] and into the bargain, though perhaps rightly in another context, the courts have required not the less expensive hearing of solicitors in chambers, but of counsel in open court. Moreover, it has been ruled that all interested parties must be represented, and in one case this led to the appearance of eleven counsel, including three "silks."[73] Almost every trust in England and Wales is affected by estate duty and taxation, and there will be a great many conservative, and possibly wise, trustees and their advisers who will hesitate to incur High Court costs, particularly in relation to smaller estates, though the needs of the beneficiaries be considerable.[74] Indeed, if tax avoidance is to provide 90 per cent. of the work of the Act, and it may well become so, Parliament should reconsider the whole justification for the Act. Is this the best available method of relieving such a fundamental need with all trusts and their beneficiaries? And, a more basic consideration, is this game of chess an appropriate role for the courts? It is not without interest that there is no reported evidence of American courts varying trusts merely to enable the beneficiaries to avoid federal or state taxes.[75]

---

[70] See the Charitable Trusts (Validation) Act, 1954.

[71] The settlor can himself apply to the court or be joined by the court as a respondent, and his views will be heard. It is generally considered, however, that should the settlor's objections be unreasonable in the eyes of the court, the court would overrule the objections. " But it is common knowledge that [under s. 25 of the Matrimonial Causes Act, 1950, the Probate Division] does exercise the power of overriding the wishes of a living and expostulating settlor if it sees fit to do so "; *per* Davies J. in *Thomson* v. *Thomson* [1954] P. 384, at p. 393.

[72] s. 1 (4).

There is another problem. During the committee stage of the Bill in the Commons members pressed for an amendment requiring all cases to be heard in open court, so vital was it to know what the courts were doing under the Act. This was resisted by the Solicitor-General, however, on the grounds that the courts should retain their discretion in the matter. But subsequently, of those cases that have been heard in open court, presumably because they were thought to be important, a large number—as the footnotes of this paper show—have not been reported by the official or *All England Reports*, despite the fact that points of substance were involved. The courts have had to refer to *The Times* newspaper[76] and simply unreported cases known to counsel.[77] This is most disturbing. The jurisdiction of the courts under this Act is practically limitless, and no one can be sure where the limits (if any) lie. For those who must advise upon and, indeed, decide these cases, reporting, and comprehensive reporting, is essential, as the past has shown, and this is particularly so when an unknown volume of applications is heard in chambers. It is true, however, that hearings under the Act do not easily lend themselves to law reporting, and therein lies a real problem which must be solved.[78]

---

[73] *Re Cohen's Will Trusts* [1959] 1 W.L.R. 865.

[74] In order to release capital from the small trust, such trustees are thrown back upon the more restricted scope of the power of advancement, if any. See further Waters, "The Creation of Sub-Trusts under a Power of Advancement," 23 *The Conveyancer* (N.S.) (1959), pp. 27 and 423.

[75] See further G. G. Bogert, *Trusts and Trustees* (1953 and Supplements; West Publishing Co., St. Paul., Minn.).

[76] See *Re Clitheroe's Settlement Trusts*, *supra*, n. 52.

[77] See *Re Joseph's Will Trusts* [1959] 1 W.L.R. 1019; [1959] 3 All E.R. 474. See also *Re Derby's Settlement*, *The Times*, July 14, 1959. Would not a full report of this latter case have been valuable, referring, as it does, to s. 64 of the Trustee Act, 1925?

---

[78] *e.g.*, what types of arrangement come within " benefit " to the persons concerned in paras. (*a*) to (*c*)? Precedent is vital, yet at the time of hearing the details of many trusts and arrangements will appear merely factual and of little or no long-term significance.

SOME ASPECTS OF RECEIVING

S. PREVEZER

THE receiver of stolen goods has always represented a serious threat to the lawful enjoyment of property.[1] As one American writer has commented: "If no thief stole anything not desired for his own personal use, the problem of law enforcement would be greatly simplified. . . . [The] 'fence' stirs up countless larcenies which would otherwise not be committed and tends to put this type of crime on an organised 'business' basis."[2] Like other property offences, crimes of receiving appear in recent years to have become more common than ever before in this country.[3] In 1958, over 10,000 indictable offences of receiving were known to the police.[4] In respect of these, approximately 1,000 persons were dealt with on indictment at assizes or quarter sessions and nearly 6,000 were tried summarily by magistrates' courts, which also heard a few cases involving summary offences of receiving.[5] These figures alone would suggest that it may be worth reconsidering the effectiveness and adequacy of our present law of receiving. Moreover, the fact that the vast majority of persons charged with receiving are dealt with summarily underlines the need for clear and certain rules of law which can be easily understood and applied by lay magistrates and their clerks. It is the object of this paper to consider certain aspects of our present law of receiving which have recently been shown to be either inadequate or too unsettled to satisfy this need for certainty.

The indictable offences of receiving are contained in section 33 (1) of the Larceny Act, 1916.[6] This provides that: "Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence of the like degree. . . ." The felony of receiving is punishable with a maximum of fourteen years' imprisonment and the misdemeanour with a maximum of seven years' imprisonment. The summary offence of receiving, covering property obtained by the commission of a summary offence, is contained in an unrepealed section of the Larceny Act, 1861,[7] and is subject to the usual maximum punishment which can be imposed by magistrates' courts. In addition there is also said to exist a common law misdemeanour of receiving stolen property, subject to no fixed maximum punishment, but this is today virtually extinct, although it was invoked in 1906[8] to fill a gap left by the wording of the Larceny Act, 1861, and again in 1909[9] to cure a formal defect in an indictment for committing the statutory felony of receiving.

---

[1] See, for example, generally Radzinowicz, *History of English Criminal Law* (Vol. 1, 1948).

[2] Perkins, *Criminal Law* (1957), at p. 273.

[3] See further *Criminal Statistics, England and Wales 1958*, Cmnd. 803 (1959).

[4] *Ibid.* Chap. III, at p. viii.

[5] *Ibid.* Table B, at p. 7; Table C, at p. 10.

[6] 6 & 7 Geo. 5, c. 50.

These offences of receiving are basically very similar. They all require a receipt, knowledge of the circumstances surrounding the original obtaining, and a particular guilty intent, though this last requirement is not expressly stated in the formal definitions of the offences. They differ fundamentally only in so far as they cover property obtained in different ways, *i.e.*, by the commission of different degrees of offence.

It is not intended to elaborate here on the first of these common requirements, the receipt. Although this represents the crux of the *actus reus* of receiving, it gives rise to an essentially factual problem which has been considered by the courts in innumerable forms, which it would be difficult to analyse in a paper of this nature. Briefly, although receipt for the purposes of receiving meant primarily receipt of possession, the test is now essentially one of control.[10] Since control is an inherently vague concept and may be joint as well as exclusive, it has given rise to awkward problems in cases involving husband and wife[11] or master and servant[12] or, particularly, persons assisting the original wrongdoer to dispose of the property[13] or purchasing it from him.[14] The courts have repeatedly stated that whether an accused person had sufficient possession or control is a question of fact for the jury and not of law for the judge[15] and, partly in consequence of this, some of the decisions on the point undoubtedly appear inconsistent with others.

---

[7] 24 & 25 Vict. c. 96, s. 97.

[8] *R.* v. *Payne* [1906] 1 K.B. 97.

[9] *R.* v. *Garland* [1910] 1 K.B. 154.

[10] See, for example, *R.* v. *Goodspeed* (1911) 6 Cr.App.R. 133; *R.* v. *Berger* (1915) 11 Cr.App.R. 72; *R.* v. *Gleed* (1916) 12 Cr.App.R. 32; *R.* v. *Middleton* (1923) 17 Cr.App.R. 89. But see *Hobson* v. *Impett* [1957] Crim.L.R. 476.

[11] Compare, for example, *R.* v. *Woodward* (1862) L. & C. 122, and *R.* v. *Orris* (1908) 1 Cr.App.R. 199.

[12] See, for example, *R.* v. *Parr, Brown, Miller and Holborne* (1841) 2 Moo. & Rob. 346, and *R.* v. *Pearson (No.* 2) (1908) 1 Cr.App.R. 79.

It should, therefore, prove more rewarding to focus attention here on the three remaining basic features of receiving, all of which raise legal, rather than essentially factual, issues, and to deal in turn with (i) the property which may be the subject of a charge of receiving, (ii) the requirement of guilty intent, and (iii) the need to prove knowledge of the circumstances surrounding the original obtaining. Before doing this, however, it may be helpful to trace very briefly the history of the offences of receiving, for this contains the seeds of our present difficulties.

Development of the Law Governing Receiving

At common law, receiving was a misdemeanour limited to cases of property which had been stolen and was punishable by fine and imprisonment. Until the last century, thieves were generally liable to be hanged and this misdemeanour of receiving was apparently never regarded as very adequate. Such writers as Hale and East, for example, hardly referred to it at all[16] and were more concerned with the graver possibility of implicating the receiver of stolen goods as an accessory after the fact to the original larceny and with the groping efforts of early legislation[17] to overcome the difficulty that such an accessory must have received the thief rather than the property he had stolen. Indeed, the mood of seventeenth- and eighteenth-century opinion was extremely hostile to receivers, and Radzinowicz cites a pamphlet printed in 1701 advancing a doctrine of maximum severity and urging, typically, that "in Morality and Reason, they [Receivers] are equally guilty with Thieves."[18] Despite the repeated intervention of Parliament after 1691 and the increase in 1717[19] of the penalty for receiving from fine and imprisonment to transportation for fourteen years, one finds constant criticism in this period directed at a state of law which conferred "virtual impunity" on receivers of stolen goods and others who helped to circulate the spoils of crime.[20] As the incredible career of the notorious Jonathan Wild shows, this criticism was not grossly extravagant.[21]

---

[13] See, for example, *R.* v. *Gleed*, *loc. cit.*, n. 10 above, and *R.* v. *Dunn, Durnford and Manley* [1959] C.L.Y. 776; *The Times*, April 14, 1959.

[14] See, for example, *R.* v. *Wiley* (1850) 2 Den. 37; *Hawes* v. *Edwards* (1949) 113 J.P. 303; *R.* v. *Fallows* (1949) 13 J.C.L. 179.

[15] See, for example, *R.* v. *Leary* (1913) 9 Cr.App.R. 85; *R.* v. *Brooker* [1956] Crim.L.R. 489.

[16] 1 Hale P.C. (1736), at p. 619, and 2 East P.C. (1803), at p. 743.

[17] See, for example, 3 Will. & M. c. 9; 1 Anne, c. 9; 5 Anne, c. 31; 4 Geo. 1, c. 11; 22 Geo. 3, c. 58.

When Parliament did first intervene in 1691, its attention was directed to this accessory requirement of proving receipt of the thief rather than of the stolen property. It provided that receivers of stolen property knowing it to be stolen were to be deemed accessories after the fact and were to suffer as such. This, however, was rendered largely ineffective by the rule requiring the thief to be tried and convicted before the accessory could be dealt with: "The thief's self-interest together with the wealth and influence of the receiver were generally sufficient to thwart the Crown's efforts to convict the former."[22] To meet this difficulty, Parliament then enacted that receivers of stolen goods could be prosecuted for a misdemeanour and punished by fine and imprisonment even though the principal felon was not convicted,[23] and in effect, therefore, the wheel had turned full circle, for the provision really only restated the original common law misdemeanour. This, in turn, was soon supplanted by further enactments in the eighteenth century, the distinctive features of which were their technicality and limited application, and it was not until the Larceny Act, 1827,[24] one of the great legal reforms initiated by the Peel Government, abrogating no less than seven different statutes dealing with receiving, that this part of the criminal law was put on a less technical and more comprehensive basis.

---

[18] *Loc. cit.*, n. 1 above, at p. 234.

[19] 4 Geo. 1, c. 11.

[20] See, for example, the criticism of Fielding and other reformers, cited in Radzinowicz, *loc. cit.*, n. 1 above, at p. 403.

[21] An interesting summary of Wild's career is contained in Hall, *Theft, Law and Society* (2nd ed., 1952), pp. 73–75.

[22] *Ibid.* at p. 54.

[23] 1 Anne, c. 9.

[24] 7 & 8 Geo. 4, c. 29; see, further, Radzinowicz, *loc. cit.*, n. 1, above, at p. 575.

In fact the Act established the pattern of our present law governing receiving. It created three separate offences, a felony,[25] a misdemeanour[26] and a summary offence,[27] all of which were made dependent on the manner in which the property was originally obtained, and this pattern was repeated, first, by the Larceny Act, 1861, and then by the Larceny Act, 1916. Although the wording of the sections relating to receiving underwent some significant changes in the course of the three enactments, the basic approach was the same. In each case, the offence of the receiver was wedded to that of the original wrongdoer, and no attempt was made to discriminate in principle between the possible different types of receiver. Thus, the person who makes a living out of receiving, the person who has been called the "professional" receiver or "dealer,"[28] commits the same offence and is liable to the same maximum punishment as the person who makes one isolated purchase of criminally obtained property for his own use, provided, of course, that the property was obtained by the commission of the same degree of offence in each case. The main difference in attitude towards these two quite distinct types of receiver lies in the fact that a previous conviction for receiving or for some offence involving fraud or dishonesty will affect certain rules of evidence and procedure and will assist the court in fixing the appropriate punishment within the limits imposed by Parliament.[29] As Professor Jerome Hall has remarked: "For a full century following the peak of English achievement in 1827 and on into the present, courts have been struggling to compensate for an inadequate substantive law (which does not come to grips with dealers in stolen goods) by adapting rules of procedure, especially evidence, to overcome the unusual obstacles in the way of convicting these astute offenders."[30]

---

[25] s. 54.

[26] s. 55.

[27] s. 60.

[28] See, for example, Hall, *loc. cit.*, n. 21 above, generally.

[29] See, particularly, Larceny Act, 1916, s. 43.

[30] *Loc. cit.*, n. 21 above, at p. 173.

In short, the most important basic defect in the English approach to receiving since 1827 lies in the fact that, because the division of indictable offences of obtaining into felonies and misdemeanours in no way reflects the relative seriousness of the individual offences, the gradation of offences of receiving, which is dependent on that division, is equally unrealistic. The line separating, for example, the felony of larceny from the misdemeanour of obtaining by false pretences is extremely thin and artificial, yet it may mean the difference to persons charged with receiving of fourteen years' imprisonment or five years' imprisonment. Indeed, as we shall see, it may even mean the difference between conviction and complete acquittal.[31]

THE PROPERTY COVERED BY RECEIVING

Ostensibly the simplest and most satisfactory of the basic requirements of receiving is that concerning the property which is covered by the three statutory offences. Whereas the summary offence contained in section 97 of the Larceny Act, 1861, covers only property obtained by the commission of a summary offence under the Act, the felony and the misdemeanour contained in section 33 (1) of the Larceny Act, 1916, both appear to be extremely wide in covering property " stolen or obtained *in any way whatsoever* under circumstances which amount to felony or misdemeanour." Since the corresponding sections of the earlier Larceny Acts covered only property which had been stolen or taken by a felony *either at common law or by virtue of the Acts* or which had been dealt with in certain specified ways amounting to a misdemeanour *under the Acts*, section 33 (1) of the Larceny Act, 1916, would appear to have enlarged the range of property which can be the subject of a charge of receiving.

That this is not necessarily the case is well illustrated by the recent decision in *R.* v. *Bianchi*.[32] Bianchi was charged on three counts of receiving property from Mrs. S. knowing the same to have been obtained by fraudulent conversion of money which had been entrusted to her. It was held that these charges did not disclose an offence of receiving: the essence of fraudulent conversion is that the property in question had been lawfully entrusted; in this case, therefore, it had not been obtained, but only converted, in circumstances amounting to misdemeanour. This interpretation of the wording of section 33 (1) is apparently based on the view expressed by the Court of Criminal Appeal in *R.* v. *Misell, Ringle and Errington* in 1926 that the word "obtained" is not wide enough to apply to a particular change of intention on the part of a person into whose hands goods have lawfully come. "By 'obtained' an actual and physical obtaining is meant. . . ."[33]

---

[31] See, particularly, *Director of Public Prosecutions* v. *Nieser* [1959] 1 Q.B. 254, *infra*.

[32] [1958] Crim.L.R. 813.

Unfortunately, this represents a fairly important defect in the Act and is due solely to the attempt to compress two offences into a single subsection. There is no logical reason why a person who receives property which he knows has been fraudulently converted should be any the less guilty than one who receives property which he knows has been stolen by a bailee. Indeed, although the Lord Chancellor when introducing the Bill which afterwards became the Larceny Act, 1916, stated in the House of Lords that it "faithfully consolidated the existing law,"[34] a different result would certainly have been reached using the wording of either the Larceny Act, 1827, or the Larceny Act, 1861: section 55 of the 1827 Act referred to receiving property, "the stealing, taking, obtaining *or converting* whereof is made an indictable misdemeanour by this Act" and section 95 of the 1861 Act referred even more compendiously to receiving property, "the stealing, taking, obtaining, *converting or disposing* whereof is made a misdemeanour by the Act." Thus, although the provisions of the 1916 Act enlarge the scope of receiving in one direction, they inadvertently narrow it in another.

How far does this restrictive use of the words "stolen or obtained" affect the scope of receiving? Although an absconding bailee is, like someone who commits fraudulent conversion, lawfully entrusted with the property and does not, therefore, "obtain" it under circumstances amounting to felony or misdemeanour, he does undoubtedly steal it in circumstances amounting to the felony

[33] (1926) 19 Cr.App.R. 109, at p. 111.

[34] See, further, Kenny's *Outlines of Criminal Law* (17th ed., 1958), at p. 239.

of larceny (by a bailee). A more difficult problem arises with regard to embezzlement, for an embezzler is also lawfully entrusted with the property and, however close may be the connection between his offence and larceny, it is doubtful whether he can be said to have " stolen " it for the purposes of receiving. Although the textbooks[35] assert that embezzled property is " stolen " for these purposes, the only authority cited is an old case of 1858, *R.* v. *Frampton*,[36] which is hardly relevant today.

Frampton was convicted under the Larceny Act, 1827, of feloniously receiving embezzled property, and section 47 of that Act, dealing with embezzlers, expressly provided that such offenders " shall be deemed to have feloniously stolen (the property)." That the decision of the Court of Crown Cases Reserved affirming the conviction was based on these words is clear from the judgment of Chief Baron Pollock: " There is no difference in the opinion of the court with reference to the meaning of the forty-seventh section of this statute. It is very likely that, there being no statute enacting that it should be an offence to receive goods which had been embezzled, the words of the section which provide that a person who embezzles shall be deemed to have feloniously stolen, were inserted for the purpose of turning all embezzlements into larceny." Although it is true that larceny by a servant and embezzlement are now treated similarly and are both contained in a single section of the Larceny Act, 1916,[37] and that a person may be charged with one offence and convicted of the other,[38] there is no equivalent provision in the present Act to that contained in section 47 of the Larceny Act, 1827. In view of this omission, as well as the reasoning adopted in *R.* v. *Bianchi*, and the recent statement of Lord Goddard in *Rose* v. *Matt* that " the old cases may be of assistance in the construction of the Act, but if the words of the Act are clear they govern . . . ,"[39] it is suggested that there is, today, no offence of receiving embezzled property.

---

[35] See, for example, Archbold's *Criminal Pleading, Evidence and Practice* (34th ed., 1959), at p. 791.

[36] (1858) Dears. & B. 585; 169 E.R. 1131.

[37] s. 17.

[38] s. 44 (2).

[39] [1951] 1 K.B. 810, at p. 813.

With regard to offences other than fraudulent conversion, the courts have undoubtedly adopted a wide interpretation of the phrase "stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour," sometimes clearly distorting the ordinary meaning of these words in the interests of securing a conviction.

In *R.* v. *Kutas and Jerichower* in 1923,[40] for example, the person from whom the accused had received the property had been convicted, not of obtaining it by false pretences, but of conspiring to obtain it by false pretences. Counsel for the accused contended in the Court of Criminal Appeal that, unless some limitation was imposed on the words, "a person could be found guilty of receiving under this section whenever any misdemeanour had been committed, such as non-registration under the Registration of Business Names Act, 1916, . . . if it could in any way be connected with the obtaining."[41] Lord Chief Justice Hewart replied that this argument would "deprive the words of any real meaning at all. It was enough to show that the goods . . . had been obtained in circumstances which amounted to a conspiracy to defraud the vendors of the goods."[42] This, with respect, hardly meets the objection that obtaining by false pretences and conspiracy to obtain by false pretences are quite separate and distinct offences. To convict a person of conspiracy to obtain does not necessarily mean that goods which, after the commission of the conspiracy, changed hands between one of the conspirators and the intended victim, must be the subject of a successful charge of obtaining. While evidence of the commission of the preliminary offence may facilitate a conviction of the later offence, it is difficult to appreciate in what sense the property in the case was "actually physically obtained" in circumstances amounting to a misdemeanour.

In a later case heard by the Court of Criminal Appeal, *R.* v. *Klein*,[43] Mr. Norman Birkett (as he then was) raised the same objection to a similar conviction but the Lord Chief Justice remained convinced that his decision in *Kutas and Jerichower* some nine years earlier was correct. The crucial fact, to his mind, was that the section read " obtained under circumstances which amount to . . . misdemeanour " and not " obtained by misdemeanour." Unfortunately, he did not apparently refer in his judgment to his own intervening decision in *Misell, Ringle and Errington.*

---

[40] 17 Cr.App.R. 179.

[41] *Ibid.* at p. 180.

[42] *Ibid.*

[43] (1932) 23 Cr.App.R. 185; this case is also reported at p. 173 on the question of bail.

An offence which has given rise to the same problem in receiving is obtaining credit by fraud contrary to section 13 of the Debtors Act, 1869.[44] What would appear to have been the first case on the point, *R.* v. *Schweller* in 1924,[45] has been the subject of some speculation,[46] caused primarily by the poor report of the decision in the *Criminal Appeal Reports.* The headnote to this, reading that " To receive goods knowing that the vendor obtained them on credit under false pretences or by means of fraud other than false pretences is not an offence known to the law," is not much more helpful than the brief statement in the judgment to the effect that " there was no allegation of an offence known to the law." Fundamentally, these words are open to two very different interpretations: either, on the one hand, that an indictment in the terms of the headnote is inadequate or, alternatively, that goods obtained in circumstances amounting to the misdemeanour of obtaining credit by fraud are not, to use the words of *Misell, Ringle and Errington,* " actually and physically obtained " by a misdemeanour. Since the decision in *Schweller* came only six months after that in *Kutas and Jerichower* and some two years before that in *Misell, Ringle and Errington,* and since two of the judges in *Schweller* had sat in the Court of Criminal Appeal in *Kutas and Jerichower,* it would be strange if the interpretation later adopted in *Misell, Ringle and Errington* were the intended one.

Indeed, on a close examination of the report in *Schweller,* it does appear that the decision was based on the view that the indictment was badly drafted. Although the statement of offence clearly conforms to the requirements of receiving and closely follows the wording of section 33 (1) of the Larceny Act, 1916, the particulars of offence read that the accused " did receive . . .

---

[44] 32 & 33 Vict. c. 62.

[45] 18 Cr.App.R. 52.

[46] See, for example, Camb.L.J. (1959), pp. 14–17.

seventy-eight pieces of plains knowing the same to have been obtained . . . on credit under false pretences or by means of fraud other than false pretences." Although the meaning of these particulars is perfectly clear, they are, indeed, strictly incorrect, and should presumably have read, for example, "did receive . . . seventy-eight pieces of plains knowing that a debt or liability had been incurred and credit obtained in respect of the said plains by false pretences . . . ," etc. The difference, though somewhat superficial, was apparently regarded as crucial and this, certainly, seems to be the interpretation which has been placed on the decision in *Schweller* in the recent cases of *R.* v. *New* in 1957[47] and *Director of Public Prosecutions* v. *Nieser* in 1958.[48]

It would appear, therefore, that property which has been stolen or obtained by false pretences or which did, or might, give rise to a charge of conspiracy to obtain by false pretences or of obtaining credit by fraud may be the subject of receiving, whereas property which has been fraudulently converted or, perhaps, embezzled may not. The reasoning adopted in the cases is inconsistent, the offence being sometimes narrowly, and sometimes widely, interpreted. Moreover, although it is clear from the recent decision of *D'Andrea* v. *Woods* in 1953[49] that the wording of the Larceny Act, 1916, is wide enough to cover not merely property which itself has been "stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour" but also the converted proceeds of such property,[50] the law is still uncertain in many respects. It remains to be seen, for example, what attitude the courts will adopt if the property originally changed hands in reliance on a forged document or perjured statement in circumstances not amounting to obtaining by false pretences. Will the restrictive interpretation adopted in *Misell, Ringle and Errington* be followed or will the courts impose no limitation on the wording of the section?

The same requirement that the property must have been "stolen or obtained in any way under circumstances which amount to felony or misdemeanour" has given rise to at least one further problem which warrants the attention of Parliament. These words have traditionally been interpreted to mean that the receiver must take possession or control of property which, *at the time of the receipt*, possesses the attribute of stolen property, etc.[51] Although there may be successive receivers and a person may be guilty of receiving property which was actually stolen by someone other than the person from whom he received it, it has repeatedly been held that, if before the receipt the property reverted to the possession of the true " owner " or his lawful agent, then it ceased to be stolen property for the purposes of receiving. This occurs most often in cases where the police intercept property on its way to the receiver, and it produces the regrettable result that if they retake possession on behalf of the owner, the ultimate recipient is not guilty of receiving, however clear and reprehensible his intent. In other words, the more the police do to catch the thief with the property, the more likely they are to lose their hold on the receiver.

---

[47] 41 Cr.App.R. 207.

[48] *Loc. cit.*, n. 31 above.

[49] 37 Cr.App.R. 182.

[50] s. 46 (1).

If one can assume that the risk in this country of the police deliberately inducing or " entrapping " a person into committing an offence of receiving is fairly remote, then the present legal position must appear quite ludicrous. In order to prevent an acquittal, the courts are prepared to go to considerable lengths to avoid attributing possession to the " owner " between the original offence and the receipt. Thus, in *R.* v. *King* in 1938,[52] the Court of Criminal Appeal assumed, for the purposes of securing a conviction, that although receipt as regards the receiver may mean either possession or control, the property does not cease to be stolen unless it was not merely under the control but also in the possession of the police. However commonplace this type of specious reasoning may be in this branch of the criminal law, it is still hardly wide enough to cover many, if not the majority of, cases of this sort which are likely to arise.

Theoretically, one possible answer might be to treat the accused in such cases as having attempted to commit an offence of receiving. Unfortunately, the law relating to attempts to commit impossible crimes is extremely uncertain. On the one hand, Dr. Glanville Williams has suggested[53] that the law of attempt is already wide enough to cover, not merely the person who attempts to take possession or control of property which he knows was criminally obtained, but also the person who actually takes possession or control of property which he believes was so obtained. On the other hand, this conclusion has been challenged by Professor J. C. Smith,[54] whose view is considerably reinforced by the fact that in none of the many cases of this kind in this country[55] has there been a conviction for attempted receiving.

---

[51] See, for example, *R.* v. *Dolan* (1853) Dears. 436; *R.* v. *Villensky* [1892] 2 Q.B. 597; *R.* v. *King* [1938] 2 All E.R. 662.

[52] *Op. cit.*

The better answer is surely to recognise that the need to prove that the property is still stolen, etc., at the time of its receipt is in many cases far too favourable to the accused. Thus, the Draft Model Penal Code of the American Law Institute[56] has dealt with the problem by separating the " professional " receiver or " dealer " from the person who makes an isolated receipt for his own use and by providing that, in the case of the former, it is not necessary to prove knowledge that the property is stolen: belief will suffice and the property need not still be regarded as stolen at the time of the receiver's offence. This approach sensibly treats the two classes of receiver as quite distinct from each other and does not hamstring the efforts of the police to catch the " professional " receiver who obviously represents the more important threat to society. Moreover, as will shortly be seen, it also obviates another difficulty which the requirement of knowledge, as presently interpreted, represents to the prosecuting authorities.

THE INTENT IN RECEIVING

The wording of the three statutory offences of receiving makes no mention of any requirement of guilty intent and, interpreting them literally, it would appear that the only *mens rea* necessary is knowledge of the manner in which the property was criminally obtained.

---

[53] *Criminal Law* (*The General Part*) (1953), at pp. 487–490.

[54] See further, 70 Harv.L.R. (1956–57), p. 422.

[55] This appears to be largely the case in the United States as well; see, further, Smith, *op. cit.*, n. 54 above.

[56] Article 206, Section 206.8.

However, it would be ludicrous not to read some requirement of guilty intent into the sections. Otherwise, someone who took possession or control of the property with the requisite knowledge would automatically be guilty of an offence of receiving even if, like a policeman, he intended to return it to its owner.

The first case to make this point abundantly clear was *R.* v. *Matthews.*[57] At first instance, Matthews was convicted of knowingly receiving stolen property. In evidence, he admitted receiving the property knowing it was stolen but stated that when he received it, he intended to hand it over to the police. Indeed, it was accepted that he made an appointment with them for that purpose, which he kept but he then failed to hand over the property. Subsequently the police called to see him about other matters and took him into custody. On his way to the police station in the police car, he took the stolen property out of his pocket and slipped it down behind the seat where it was found the next day. It was held by the Court of Criminal Appeal that his conviction could not stand. Even if he had subsequently changed his mind about returning the property, his original intent to return it exempted him from liability. Lord Goddard added that the reasoning of the courts in such larceny cases as *R.* v. *Riley*[58] and *Ruse* v. *Read*[59] to the effect that a trespassory taking followed by the *animus furandi* is sufficient for a conviction of larceny, was not to be transferred to receiving. However, as he himself recognised, this reasoning could hardly have been relevant to the facts of *Matthews'* case, since it could not be held that his original taking was trespassory. Someone who finds, or is given, stolen property and takes it intending to return it to the owner cannot be said to have committed a trespass, for he takes it with the implied consent of the owner.

The decision, therefore, establishes two things: first, that receiving requires a guilty intent in addition to guilty knowledge, and secondly, that such intent must exist at the time of the receipt.

Whilst the latter requirement is at least clear, it is questionable whether it is sensible. Since, admittedly, the offences are defined as offences of receiving and not of retaining and since, moreover, the sections clearly imply, and the cases establish, that the requisite knowledge must exist at the time of the receipt,[60] it is obviously correct in theory to interpret them as requiring the guilty intent also to exist at the time of the receipt. But it is debatable whether in principle this interpretation is not too lenient, however limited its application may be in practice. Although in *R.* v. *Matthews* Lord Goddard stressed the need not to confuse the reasoning in cases of larceny and receiving, his interpretation of receiving follows basically the original common law requirement of larceny, before it became largely submerged by fictions and statute, that the taking and the intent must be simultaneous. This requirement is no less challengeable in the context of receiving than it was in that of larceny. Why should someone like Matthews completely escape criminal liability merely because his original intent was innocent? As has been contended with regard to larceny,[61] the fact of an original innocent intent should merely provide grounds for diminishing either the gravity of the offence or the length of the sentence: it should not afford a complete exemption from criminal liability. Many jurisdictions, notably in the United States, have already converted the original offence of receiving into an offence of retaining[62] and this course, it is suggested, should commend itself to Parliament.

---

[57] (1949) 34 Cr.App.R. 55.
[58] (1853) Dears. 149.
[59] [1949] 1 K.B. 377.

With regard to the first and fundamental point established by *Matthews'* case that receiving requires a guilty intent as well as guilty knowledge, it suffers from the defect inherent in our system that no attempt was made to go beyond the facts of the case and define what amounts to a guilty intent for the purposes of receiving. We are merely told that if the accused intended to return the property to its owner, his intent is innocent and he will not be guilty of receiving. We are given no indication as to what other types of intent will be considered guilty or innocent for these purposes. For example, does receiving, like larceny, require an intent permanently to deprive or will some lesser intent suffice? Since one may be guilty of receiving goods which have been criminally obtained otherwise than by stealing, there is no logical reason to suppose that the larceny requirement should be proved in all cases of receiving. Yet, it is at least arguable, in view of the basic dependency of the receiver's offence on that of the original wrongdoer, that the intent of the receiver should be the same as that of the original wrongdoer, and that where the property has in fact been stolen, it should be necessary to prove an intent permanently to deprive on the part of the receiver as well as the thief. To accept as sufficient for receiving merely an intent to make unauthorised use of the property without a claim of right might mean that a person who takes the property with intent permanently to deprive is subject to a possible maximum of five years' imprisonment for simple larceny, whereas someone who receives it from him intending merely to use it for a day before returning it to its owner is subject to a possible maximum of fourteen years' imprisonment for receiving. If, in short, the receiver's offence is dependent on that of the original wrongdoer, should not his intent be equally dependent?

---

[60] *R.* v. *Johnson* (1911) 6 Cr.App.R. 218; *R.* v. *Poulton* [1928] J.C.L. 331; an interesting and suggestive case is *R.* v. *Martin and Oliver* [1944] J.C.L. 166.

[61] See, for example, Prevezer, "Criminal Appropriation," 10 *Current Legal Problems* (1958), pp. 168–176.

[62] See further, Perkins, *loc. cit.*, n. 2 above, at p. 275; see, for example, s. 1308 of the New York Penal Law.

Matthews' case is silent on this point, and the older authorities, which were apparently not cited, are not much more helpful. Whilst it has been established that a bona fide claim of right is a good defence to a charge of committing the felony of receiving,[63] there is no certainty, however probable it may be, that it is equally a defence to other charges of receiving. In each instance, the judges have gone no further than was necessary to decide the problem in issue. Thus, one learns from the decision of Baron Gurney in *R.* v. *Davis* merely that: "If the receiver takes without any profit or advantage or whether it be for the purposes of profit or not or merely to assist the thief, it is precisely the same."[64] Similarly, in *R.* v. *Richardson*, Taunton J. established merely that: "Whether he [the receiver] made any bargain or not, is a matter of no consequence. If he received the property for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased it. It is a receiving within the meaning of the statute."[65]

---

[63] *R.* v. *Wood* (1859) 1 F. & F. 497.

[64] 6 Car. & P. 177; 172 E.R. 1196, at p. 1197.

There is no indication in any of these cases of the exact limits of this type of reasoning. One American writer has remarked: "It is not incorrect to say that guilt of this offence requires a wrongful intent, but this is understood to mean no more than that an innocent intent is inconsistent with guilt. It does not mean that there is some specific intent which is an additional element of the offence and which the prosecution is required to allege and affirmatively to prove."[66] Yet, in the recent English case of *R.* v. *Dickson and Gray* in 1955,[67] a conviction for receiving was reversed by the Court of Criminal Appeal because the jury was not directed that a felonious intention had to be established, presumably by the prosecution. Again the court did not state what amounts to a felonious intention.

These cases do not really carry us very far. While they provide particular instances of an innocent or guilty intent, there is no attempt to establish any general principles of justification. Rather than leave it to the courts to decide what amounts to an innocent or guilty intention in this context, it is surely preferable for Parliament to lay down the precise limits of defences to charges of committing property offences. Whilst Parliament sometimes deliberately confers a discretion on the courts, there seems to be no reason to suppose that in this particular branch of the criminal law such discretion was intended or is desirable.

THE REQUIREMENT OF KNOWLEDGE

With the creation of new offences of obtaining and the belated but consequent expansion of the scope of receiving, the common law requirement of knowledge that the property had been stolen was in time replaced by the statutory requirement of knowledge that the property had been stolen or obtained by a felony, a misdemeanour or a summary offence.

---

[65] 6 Car. & P. 335; 172 E.R. 1265, at p. 1266.
[66] Perkins, *loc. cit.*, n. 2 above, at p. 281.
[67] Crim.L.R. 435.

It is not immediately apparent from the wording of section 33 (1) of the Larceny Act, 1916, that the felony and the misdemeanour of receiving require different degrees of knowledge. It is possible to interpret the section as creating two separate offences, differing in their dependency on whether the property was originally obtained by a felony or a misdemeanour, but both requiring knowledge that the property had been obtained by either a felony or a misdemeanour. Indeed, the fact that there is no real significance in the division of offences of obtaining into felonies and misdemeanours lends some support to this interpretation. However, it is clear that the earlier Larceny Acts treated these offences quite separately, requiring a different degree of knowledge for each of them, and since the present Larceny Act is meant to do no more than restate previously existing law, this interpretation can hardly be supported. Any possible doubt has now been dispelled by the recent decision of the Divisional Court in the *Director of Public Prosecutions* v. *Nieser* [68] to the effect that the felony and the misdemeanour of receiving require different degrees of knowledge: the felony requires knowledge that a felony has been committed and the misdemeanour requires knowledge that a misdemeanour has been committed. While this, with respect, is clearly the correct interpretation of the section, it is questionable whether this interpretation need have entailed such disastrous results as the Divisional Court reached in *Nieser's* case.

Although the facts of the case are somewhat involved, the problem they present is easy to formulate. If someone receives property which has been obtained by a misdemeanour, and there is no evidence that he knew of the circumstances of the obtaining but there is some evidence that he knew the property was dishonestly obtained, can he be convicted of the misdemeanour of receiving? Although the Divisional Court reserved judgment for a month before holding that there could be no conviction, the decision is not merely regrettable in practice but debatable in law.

Unfortunately, the Divisional Court stated that the misdemeanour of receiving was first created by the Larceny Act, 1861, and thus ignored the Larceny Act, 1827. Perhaps in consequence of that mistake, it also ignored the only previous decision on the point, which in fact directly supported its conclusion. In *R.* v. *Rymes* in 1853,[69] it was proved that a cheese which had been obtained by false pretences was sold to the accused, a publican, for far less than its true value. Counsel for the accused submitted that, on the evidence, his client could not have had the slightest knowledge that the cheese had been obtained by false pretences, and Vaughan Williams J. directed the jury that if they found that the accused did not know the cheese had been obtained by false pretences, they ought to acquit him, which they did. In effect, therefore, the inference of knowledge of a dishonest obtaining, drawn from the price paid, was insufficient.

---

[68] *Loc. cit.*, n. 31 above.

The facts of *Nieser's* case are fundamentally similar. Nieser, too, received property which had shortly before been obtained by misdemeanour, in one case by the offence of obtaining by false pretences, and he, too, paid far less than the true value of the articles in question. In fact, however, there was probably less doubt about his state of mind, for when he was being questioned by the police about one of the articles and was then found to be in possession of the other, he made a statement which undoubtedly supported the inference that he knew that the property had been dishonestly obtained. The important difference between the two cases is that *Rymes* was not decided in 1958 by an appeal court after lengthy deliberation: indeed, there have perhaps been sufficient changes in our law since 1853 to have warranted a conviction on the facts of *Nieser's* case.

The first point to be made about *Nieser's* case relates to the concept of recklessness. Since the magistrates had found that there was some evidence that Nieser knew when he received the property that it had been dishonestly obtained, one could presumably have inferred that he was reckless about how it was obtained, *i.e.*, that he was indifferent and did not care whether it had been obtained by felony or misdemeanour. Although the wording of the receiving offences refers to knowledge, is recklessness a sufficient substitute?

---

[69] 3 Car. & Kir. 326; 175 E.R. 574.

Unfortunately, this point was never argued before the Divisional Court and there is no reference to it in the judgment. Certainly, the concepts of knowledge and recklessness have been equated in other contexts in English criminal law,[70] and there are a number of cases on receiving which deal with the question of recklessness, although the decisions appear to be in conflict. In an old case, *R.* v. *White* in 1859,[71] Baron Bramwell accepted that belief, without actual knowledge, was sufficient and directed the jury to convict if they thought " the circumstances were such . . . as to make the prisoner believe that (the property) had been stolen." However, *R.* v. *White* was not cited in a later case decided by the Court of Criminal Appeal, *R.* v. *Havard* in 1914, in which Ridley J. stated categorically that " it is not sufficient to say that if a man is reckless and does not care, he is just as guilty as if he received the property knowing at the time that there was *something wrong with it*." [72]

Professor Edwards, on the one hand, infers [73] that the two decisions are irreconcilable and this, indeed, seems to be the most probable explanation. Dr. Glanville Williams, on the other hand, argues [74] that recklessness is sufficient if it means, as in *R.* v. *White*, belief in a probability, but insufficient if it means, as in *R.* v. *Havard*, merely belief in a possibility. However welcome this distinction might be, the fact remains that English criminal courts do not, unfortunately, analyse recklessness in terms of belief in a probability or possibility, and there seems to be little support for Dr. Williams' view.

Yet, a later decision of the Court of Criminal Appeal, *R.* v. *Snelling* in 1942,[75] certainly indicates, despite *R.* v. *Havard*, that recklessness may be sufficient in cases of receiving. In *Snelling's* case there was some evidence that the accused suspected that the property had been supplied to him in breach of a rationing order, but the court held that this did not necessarily suggest " a further suspicion that (the goods) had been stolen." The inference to be drawn from this statement is that a conviction for receiving can be founded on a suspicion that the property has been stolen even though the accused lacks the knowledge required by the section.

---

[70] See further, for example, Williams, *loc. cit.*, n. 53 above, Chap. 2, pp. 28–81.

[71] 1 F. & F. 665.

[72] 11 Cr.App.R. 2, at p. 3.

[73] *Mens Rea in Statutory Offences* (1955), at pp. 204–205.

[74] *Loc. cit.*, n. 53 above, at p. 127.

[75] 28 Cr.App.R. 117.

Neither these authorities, nor the general role of recklessness in criminal law, were considered by the Divisional Court in *Nieser's* case; if this, *sub silentio*, supports the view expressed in *R.* v. *Havard* that recklessness is not sufficient, then the prosecution may be saddled with a heavy and unwarrantable burden. However suspicious he may be, provided the accused did not pursue his inquiries too diligently, he stands a fair chance of avoiding all criminal liability, at least in cases where he is charged with committing the misdemeanour of receiving. If the property was not obtained by a felony and the prosecution, therefore, cannot normally invoke the assistance of the doctrine of recent possession,[76] the likelihood of a conviction must be fairly remote.

The second point to be made about *Nieser's* case relates to the defence of mistake of fact. If Nieser knew the property had been dishonestly obtained and was not merely reckless or indifferent as to how the property was obtained, then his knowledge must have been founded on a firm and positive belief in the circumstances of the obtaining. Since the scope of summary offences of obtaining is extremely limited, he must reasonably have believed either, correctly, that the actual misdemeanours committed were committed or, mistakenly, that the property had been obtained by felony or by some other misdemeanour. It is submitted that either belief should be sufficient to found liability.

In the first case, it is clearly arguable that a correct and firm belief founded on some information that the goods were obtained by the actual misdemeanours committed amounts to knowledge that they were so obtained. Knowledge is a difficult concept to define. Although, strictly, it would seem to signify an acquaintance or familiarity with a fact, if one believes positively and correctly in the existence of a fact, and that belief is based on some information, one is normally said to have knowledge of that fact. If Nieser believed accurately, on what information was available to him, that the property had been obtained by the misdemeanours actually committed, then he might be said to have known that those misdemeanours had been committed.[77]

---

[76] *Infra.*

The problem is, admittedly, more difficult if Nieser had mistakenly believed that the property had been obtained by felony or by some other misdemeanour. Since knowledge is dependent on belief in an existent fact, one cannot normally be said to " know," if the " fact " believed in is non-existent. Here, one cannot fall back on ordinary usage in support of an argument for conviction, for this would deny that one can know that property is obtained by misdemeanour if in fact it was obtained by felony. Yet, it is recognised that the courts may avoid giving the usual meaning to words in a statute if that would lead to an absurd result,[78] and it is clearly absurd to acquit a man if he commits the *actus reus* of an offence with the *mens rea* of an essentially similar but greater offence. In the context of graduated offences like receiving, the defence of mistake of fact should not be wide enough to allow a man to escape all criminal liability if his mistaken belief, if true, would have meant that he was committing a greater offence than that with which he was charged. Assuming that knowledge of the time were essential for offences of burglary and housebreaking and that these offences were mutually exclusive, should a person who breaks into a house at 8.55 p.m. thinking it is 9.5 p.m. be acquitted of the lesser as well as the greater offence because his mistaken belief, if correct, would have meant that he was committing burglary and not housebreaking? [79]

Instead of invoking the " mischief " rule of interpretation and arguing that a person who believes that property was obtained by felony can be deemed to know it was obtained by misdemeanour, the prosecution in *Nieser's* case virtually threw in the sponge. It conceded that it would be a good defence to a charge of committing the misdemeanour of receiving if it could be shown that the accused mistakenly believed that the property had been obtained by a felony. But, it argued, the doctrine of recent possession applied to Nieser, and particularly from his possession of goods which had shortly before been obtained by misdemeanour, the magistrates were entitled to infer that he knew of the misdemeanours committed. In other words, instead of trying to argue a difficult but feasible point of law, it really founded its case entirely on an untenable proposition of fact.

---

[77] See, further, Williams, *loc. cit.*, n. 53 above, at p. 133.

[78] For a vivid, recent example of the application of the " mischief " rule, see *R.* v. *Oakes* [1959] 2 W.L.R. 694.

[79] The same type of problem was present in the minds of the judges in *R.* v. *Prince* (1875) L.R. 2 C.C.R. 154, and seems to have been an important factor in their regarding knowledge of the age of the girl as immaterial. The case thus, admittedly, supports the conclusion reached in *Nieser's* case.

The Divisional Court found little difficulty in dealing with this argument. The so-called doctrine of recent possession, it held, is merely "a convenient way of referring compendiously to the inferences of the fact which, in the absence of any satisfactory explanation by the accused, may be drawn as a matter of common sense from other facts. . . ."[80] Since the property in *Nieser's* case had been unlawfully obtained in an unusual way, *i.e.*, by the commission of certain misdemeanours, the doctrine was inapplicable to the facts, and it could not be inferred that Nieser had the requisite knowledge. If, on the other hand, the property had been obtained in the usual unlawful manner, *i.e.*, by stealing, and Nieser had been charged with the felony of receiving stolen goods, then clearly the doctrine might well have applied. While, with respect, this is obviously good law, it would be difficult to find a more damning criticism of our present offences of obtaining and receiving. For example, one of the articles in *Nieser's* case had been fraudulently obtained by means of a credit-sale agreement. This meant that ownership in the article passed and the original wrongdoer had merely committed the misdemeanour of obtaining by false pretences. If it had been obtained by a fraudulent hire-purchase agreement and ownership had not passed, the original wrongdoer would have committed the felony of larceny. Instead, therefore, of being acquitted on the lesser charge, this essentially trifling difference might have meant that Nieser would perhaps have been found guilty of the greater offence, because the doctrine of recent possession might have applied.

---

[80] [1959] 1 Q.B. 254, at p. 266.

Since property which is criminally obtained is usually obtained by larceny, the effect of *Nieser's* case may not be of wide application. Moreover, the fact that the Divisional Court disagreed with the magistrates in one respect, and held that it was not necessary to prove knowledge of the specific misdemeanour (or felony) committed but merely belief in the commission of some misdemeanour (or felony) is certainly of some assistance to the prosecution. Since the relevant part of the subsection does not state that there must be knowledge of *the* misdemeanour by which the property was obtained but merely knowledge that it was obtained " under circumstances which amount to . . . misdemeanour," this wider interpretation by the Divisional Court was probably justified. But was it wide enough? As it stands, it lends some support to the argument that a person may be deemed to have knowledge even though he is mistaken. If he can " know " that property was obtained " under circumstances which amount to . . . misdemeanour " when he is mistaken as to the actual circumstances, can he only be convicted if he thought a similar offence was committed but not if he thought a greater offence was committed? This, surely, is quite ridiculous, and indeed the Divisional Court admitted in *Nieser's* case that it seemed " the height of absurdity." [81]

To have invoked the " mischief " rule to overcome the difficulty caused by poor statutory draftsmanship would have caused no injustice and would have accorded with the approach adopted in other branches of the criminal law. There are already instances where, sometimes with less justification, the courts have shown themselves willing to link the *mens rea* of the intended offence with the *actus reus* of an unintended offence. Where, for example, in cases of murder, the intended result is similar in kind to that actually achieved by the accused's conduct, the courts are said to " transfer the malice." [82] In the case of constructive murder before 1957,[83] and in cases of manslaughter today, the courts have even been prepared to convict a person of an offence greater than that which he intended or realised or should have realised might occur.

---

[81] *Ibid.* at p. 268.

[82] See, for example, *R.* v. *Latimer* (1886) 17 Q.B.D. 23 on the general application of the principle of transferred malice.

[83] See now Homicide Act, 1957, s. 1.

Thus, today, if a person intends to assault another and accidentally kills him, he will be guilty of manslaughter.[84] Yet, as *Nieser's* case illustrates, although we accept a similar *mens rea* and even, sometimes, a lesser *mens rea* as sufficient, we will not accept a greater *mens rea* if that *mens rea* is expressed in terms of knowledge and not of a specific intent. The effect of the decision in *Nieser's* case may in practice be to make the misdemeanour of receiving a dead letter. Moreover, it clearly suggests that proof of a positive belief in the commission of a misdemeanour will negative liability for the felony of receiving.

CONCLUSION

It should be evident from this summary of only three aspects of the law governing receiving that there are many improvements which need to be effected. The whole structure of the receiving offences is illogical and unrealistic. There are many loopholes which need to be closed and the manner of dealing with the "professional" receiver is totally inadequate. In many instances, the law is uncertain, confused and difficult for the lawyer, let alone the layman, to comprehend. It is to be hoped then that when the Criminal Law Revision Committee tackles the problem of the larceny offences, it will not omit to deal with such subsidiary related offences as receiving, which form an integral and essential part of the concept of dishonest appropriation.

---

[84] *R.* v. *Larkin* [1943] K.B. 174.

COMPENSATING THE ACCIDENT VICTIM

Douglas Payne

In 1957 there were 21,561 accidental deaths in Great Britain.[1] The total number of those injured in accidents is not recorded, but in road accidents alone in 1957, 5,550 people were killed and 273,858 injured, 63,706 of them seriously.[2] In industrial accidents in the same year 1,508 people were killed,[3] and there were 784,000 new claims for injury benefit under the Industrial Injuries scheme for injuries suffered in the course of employment.[4] More remarkable still perhaps is the fact that 6,667 people were killed in accidents occurring at home.[5] During the last fifty years, 8,000,000 people have been injured and 250,000 killed in road accidents, and the accident rate is steadily rising.[6]

The economic cost of accidents on this scale must be tremendous, to say nothing of suffering and distress. The direct cost includes loss of earnings during incapacity, damage to property, cost of medical treatment, funeral expenses and suchlike, while the full indirect cost would have to take account of the loss to the community of the services of those killed and injured. I have seen no estimate of the total economic cost of accidents in this country, but in 1946 the cost of road accidents alone in this country was estimated at £100m. a year, on the basis of accident figures before the war differing little from those given above for 1957.[7] This is equivalent to well over £200m. at the present time. And some idea of the direct cost of industrial accidents may be gathered from the fact that over £35m. was paid out in benefits under the Industrial Injuries scheme in 1957.[8] These benefits ordinarily restore only part of the wage loss and take no account of the cost of medical treatment. The full direct cost of industrial accidents is, I suspect, not far short of £100m.

---

[1] *The Registrar-General's Statistical Review of England and Wales for the Year 1957, Part III, Commentary*, p. 162.

[2] *Annual Abstract of Statistics, 1958*, Table 239.

[3] *Ibid.* Table 46.

[4] *Ministry of Pensions and National Insurance Report for 1958* (Cmnd. 826—1959), Table 32.

[5] *Loc. cit.*, note 1 above, p. 172.

[6] These figures were given by the Minister of Transport in the House of Commons on December 10, 1959, in the course of a debate on traffic congestion: 473 H.C.Deb. 5s., col. 774.

[7] *Final Report of the Committee on Road Safety* (H.M.S.O., 1947), p. 13.

In this paper I should like to consider very briefly whether some more sensible and equitable system of compensation for the victims of road and industrial accidents could not be devised than that at present provided by tort liability and the National Insurance scheme. I single out these two classes of accidents because they have features, which I explain later, that are not found in all accidents, and because they account for a very high proportion of the accidents that occur.

In confining myself to the question of compensation, I do not deny the equal, perhaps even greater, importance of preventing accidents. Nor do I ignore the bearing that any rule of civil liability may have on the problem of prevention. But one can hardly expect any rule of civil liability to have much effect on the number of accidents that occur in fields where insurance against liability is either compulsory or the invariable practice, as in the two classes of accidents I shall be considering. Recent studies show, in any event, that accidents are often due, not to any conscious deviation from a standard of behaviour, but to accident proneness, that is, to a tendency in certain people, through slow reaction time, defective vision and other physical and temperamental characteristics, to have accidents.[9] For practical purposes, therefore, the problem of compensation and the problem of prevention can be considered separately.

I shall also be concerned principally in this paper with the adequacy of the existing law as a means of providing compensation for personal injuries and death rather than for damage to property. Accidental damage to property, though great, is generally covered by insurance and does not present the same social problem as the wage-loss and other consequences of personal injuries.

---

[8] *Ministry of Pensions and National Insurance Report for 1958* (Cmnd. 826—1959), Appendix III, p. 79.

[9] See the Report of the Industrial Health Research Board of the Medical Research Council, *The Personal Factor in Accidents* (H.M.S.O., 1942); also the *Final Report of the Committee on Road Safety* (H.M.S.O., 1947), pp. 27–29. For a review of the results of American studies of the personal factor in accidents, see Harper and James, *The Law of Torts* (1956), pp. 734–741.

LIABILITY FOR NEGLIGENCE

With few exceptions, which cover only a fraction of accident injuries, the general rule of English law is that a person seeking compensation for accident injuries, over and above any benefits he may be entitled to under the National Insurance scheme, must allege and prove negligence on the part of the defendant or some person for whose negligence the defendant is responsible in law. The general rule, that is to say, is no liability without proof of fault.

The fault rule has often been defended on the ground that it is morally superior to a rule of strict liability. The rule was established by the courts in the second half of the nineteenth century, and at the turn of the century it was applauded by most leading writers on the law of torts. Wigmore described the earlier concept of strict liability as "primitive, superstitious and irrational,"[10] and Ames, another American writer, thought it a matter for congratulation that "the ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."[11] Similar views were expressed in this country by Pollock[12] and Salmond.[13]

It is clear that these views were also influenced by the desire to refer the law of tort to a few broad principles. Thus, Salmond deplored the decision in *Rylands* v. *Fletcher* on the ground that it prevented, more than any other decision in the law of tort, "the establishment of a simple, uniform and intelligible system of civil liability."[14]

It seems to have been implicit in this assertion of the moral superiority of the fault rule that the effect of civil liability is to shift a loss from the plaintiff to the defendant and that the burden of any liability imposed on the defendant is commensurate with the relief it affords to the plaintiff. If the effect of a rule is merely to transfer a burden in this way, there is a good deal to be said for imposing liability only where the defendant has been at fault. Though one's sympathy goes out to the injured person, society has a clear interest in free and energetic activity and it would be difficult to justify imposing liability if the actor's conduct is blameless, especially when, as in this country at the present day, some relief for the injured person is provided by national insurance and the national health service.

---

[10] "Responsibility for Tortious Acts: Its History.—III," 7 Harv.L.R. (1894), p. 441.

[11] "Law and Morals," 22 Harv.L.R. (1908), p. 97, at p. 99.

[12] *The Law of Torts* (13th ed., 1929), pp. 140–141.

[13] *The Law of Torts* (6th ed., 1924), pp. 12–13.

[14] *Ibid.* Preface, p. viii. As Mr. R. F. V. Heuston, *Salmond's* present editor, remarks, it is odd that Salmond should at the same time have contended that there was no general principle of liability in tort, but only a body of rules establishing specific injuries: see *Law of Torts* (12th ed., 1957), p. 20.

But it is not true in modern times that the burden of liability on a defendant is necessarily commensurate with the relief it affords to a plaintiff. In respect of many classes of accidents it is the widespread practice to insure against liability, and motorists have been obliged to insure against third-party claims for nearly thirty years. The burden of any damages awarded against an insured defendant is not borne by him personally, but is spread over the whole class of those who insure against risks of the type in question. If the defendant carries on a business, the premiums he pays for liability insurance will be passed on to the general consuming public as part of the price of goods and services. Even without insurance, the sheer size of much modern enterprise is such as to enable it to absorb liability for injuries done to others as an ordinary expense of the business. Though the courts have ignored, in theory at least, this factor of insurance in personal injury claims, it can hardly be denied that it is highly relevant to the morality of the fault rule.

Liability insurance is, of course, not universal, and a general rule of strict liability would often work injustice if the damages had to be paid by the defendant personally. But this difficulty could be surmounted by making people insure against liability in those fields where a rule of strict liability is applied.[14a] There are precedents for this coupling of strict liability with compulsory liability insurance ✓

[14a] This has in fact just been done by the Nuclear Installations (Licensing and Insurance) Act, 1959, which imposes strict liability for radiation injuries on the licensees of privately operated atomic reactors (s. 4) and also imposes an obligation to ensure that claims are met up to an aggregate of £5 million by insurance or other means acceptable to the Minister of Power (s. 5).

in several Continental systems, in the field of both industrial and road accidents.[15] Though the primary purpose of it, as one would expect, has been to ensure that judgments are satisfied, compulsory insurance provides in itself the principal justification for departing from the fault rule, in protecting defendants from the possibly calamitous consequences of having to satisfy judgments out of their own resources.

Strict liability coupled with compulsory insurance could be extended to many classes of accidents. Indeed, under a system of general insurance against accident liability, it might be extended to all accident injuries. But there are several reasons for believing that some form of strict liability should be imposed for road and industrial accidents in particular.

The first and practical reason for this is that these two classes of accidents do in fact account for such a large proportion of the accidents that occur, and thus do in a sense single themselves out for special treatment. Compensation for accidents is a social problem, and a large part of the problem would be solved if adequate compensation were provided for the victims of these two classes of accidents alone. A further practical point is that these two classes of accidents would give rise to no great difficulty of definition. In the case of industrial accidents we already have the much litigated formula "accident arising out of and in the course of" employment, which has been adopted by the National Insurance (Industrial Injuries) Act, 1946,[16] and it would be no more difficult to define road accidents as a class than it was to define the risks against which a motorist must insure under the law as it now is.[17]

A further reason, also largely a practical one, is that insurance against liability is already compulsory for road accidents, and well nigh the universal practice for industrial accidents. The introduction of compulsory liability insurance for both classes of accidents would therefore make little change in insurance practice. Industrial and road accidents are also recorded, and do not vary a great deal from year to year. This should make it possible to predict with fair accuracy what a rule of strict liability would cost. In most other classes of accidents no such data are available.

---

[15] Strict liability for damage caused by motor-vehicles is coupled with compulsory insurance in Austria, Norway, Sweden, Finland, Denmark, Switzerland and Czechoslovakia: see Deak, "Liability and Compensation for Automobile Accidents," 21 Minnesota L.R. (1937), p. 123, at p. 126.

[16] s. 1 (1).

[17] Road Traffic Act, 1930, s. 36 (1) (*b*). To comply with the Act a policy must insure a person against any liability incurred "in respect of the death of or bodily injury to any person caused by or arising out of the use of the vehicle on a road."

Yet a further practical point is that in these two classes of accidents it would be relatively easy to enforce the obligation to insure. Since the principal justification of a rule of strict liability would be that the burden of any damages awarded would not fall on the defendant personally, one would need to be sure that the duty to insure will in fact be observed.

But it is not only on practical grounds that one can single out road and industrial accidents for special treatment. As the accident figures show only too well, motoring and industry are both highly dangerous, in the sense that the accidents they cause are the more or less inevitable consequence of using powerful machines in the way and at the speed that they are used. The element of risk involved in an activity has to be balanced against the benefit that society gets from it. At the one end of the scale, if the risks are too great in proportion to any benefit gained, the activity may be prohibited altogether. At the other extreme, a paramount social interest in free activity may relieve a person of all duty to take care not to injure others. In between these two extremes lies the range of activities in which at the moment reasonable care must be exercised. What seems to be needed is a division of these activities into those where an actor is liable only for failing to exercise reasonable care, and those where the risk is so great, the motive for creating it so self-regarding and liability insurance so readily available that some form of strict liability is made a condition of engaging in them.

This idea of a licence conditional on strict liability can be found both in the common law and in legislation. In the common law, it is found in the rule in *Rylands* v. *Fletcher*,[18] imposing strict liability for damage done by the escape of things from land where the land is being put to a " non-natural " use. Several factors bear upon whether or not a use of land is " non-natural," but the most important of them is the degree of risk involved. The underlying philosophy of the rule was well expressed by Bramwell L.J. in a case a few years after *Rylands* v. *Fletcher*, where the owner of a traction engine was held strictly liable for damage done by the escape of sparks from it.[19] " If the reward," he said, " which he gains for the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner ought to pay compensation for the damage." [20] It seemed possible at one time that the rule in *Rylands* v. *Fletcher* would lead to a general principle of strict liability for hazardous activities. But the courts lost enthusiasm for it: it is now confined to cases where there has been an escape from land, and there is some doubt whether it extends to personal injury claims at all.[21]

---

[18] (1866) L.R. 1 Ex. 265; (1868) L.R. 3 H.L. 330.

In the field of legislation, the idea that an enterprise or activity should insure its victims against accidents found its principal expression in the system of workmen's compensation which was in force in this country from 1897 to 1948.[22] The Workmen's Compensation Acts obliged employers to pay compensation without proof of fault to any workman who suffered injury "by accident arising out of and in the course of the employment." Compensation, which was for wage-loss only, took the form of weekly payments during disability equal to one-half of the wage-loss,[23] with a maximum which, in 1938, was a little less than half the average wage at that time.[24] The compensation was the same whether the workman was single or had a wife and children. If the accident was fatal, a lump sum was payable, the amount of which depended on the workman's earnings before the accident and the number of his dependants, again with an absolute maximum.[25] Except in the coal industry, employers were not obliged to insure against liability, though in practice they generally did so. The effect of the Workmen's Compensation Acts was to place the cost (or part of the cost) of industrial accidents on the industries in which they occurred. ✓

---

[19] *Powell* v. *Fall* (1880) 5 Q.B.D. 597.

[20] *Ibid.* at p. 601.

[21] Street, *Law of Torts* (2nd ed., 1959), pp. 251–252. It is interesting to compare the history of the *Rylands* v. *Fletcher* rule with the evolution in France of the theory of *le risque créé*. Art. 1382 of the Civil Code provides that a person shall be liable for damage caused by his fault, and until the end of the nineteenth century there was no encroachment on this principle. But in 1897 the Cour de Cassation held that another article of the Code, which imposed liability for damage caused by the acts of things under a person's care, was not a mere amplification of Art. 1382, as had generally been supposed, but created an absolute liability. This doctrine, first applied to make an employer strictly liable to his workman, has been extended in the present century to impose absolute liability on motorists for damage caused to others, the only defences being *force majeure* or that the sole cause of the accident was some unforeseen event. For an account of this extraordinary exercise in interpretation, see Lawson, *Negligence in the Civil Law* (1950), pp. 43–50, and Malone, " Damage Suits and the Contagious Principle of Workmen's Compensation," 9 N.A.C.C.A. L.J. (1952), pp. 28–37.

[22] It is also found in the Civil Aviation Act, 1949, s. 40 (2), which makes the owner of an aircraft absolutely liable for any damage caused by it, or by any person in, or by any article or person falling from it, while in flight, taking off, or landing.

Broadly similar systems of workmen's compensation, imposing the cost of accidents on the industries in which they occur, are to be found in nearly all industrialised countries. In this country, however, workmen's compensation has given place to national insurance. Compensation for industrial accidents is now paid by the state out of a national fund, known as the Industrial Injuries Fund, to which all employers and employees contribute at a flat weekly rate, as part of the general national insurance contributions.[26] The cost of accidents in the more dangerous industries, such as mining, building, shipping and the railways, is therefore partly borne by those in safer occupations. Moreover, compensation is no longer related to earnings, as under the Workmen's Compensation Acts, but is paid at a flat rate with allowances for dependants.

Though the principle of enterprise liability, as some call it, for industrial accidents has thus been abandoned in favour of national insurance, higher benefits are paid under the Industrial Injuries branch of the National Insurance scheme than are paid for sickness and unemployment not resulting from an industrial accident.[27] Industrial accidents are therefore still singled out from other accidents for special treatment.

---

[23] For poorly paid workmen the proportion was higher, rising to three-quarters of average weekly earnings if less than 25s.

[24] The limit of compensation was 30s. and the average wages of men over twenty-one 69s.

[25] In 1938 this was £600.

[26] For a man aged eighteen or more the Industrial Injuries contributions are at the moment 8d. a week from the employee and 9d. a week from the employer. For men under eighteen and women they are less.

COMPENSATION FOR ROAD ACCIDENTS

At the time when workmen's compensation was first introduced, in 1897, motor-cars were virtually unknown and road accidents were only a tiny fraction of what they are now. For thirty years or more now, however, motor traffic has taken a far higher toll of life and limb than accidents in industry, and it is only natural to ask why it is that a principle of liability that won such ready acceptance in this and other countries as appropriate to industrial accidents has not been applied in some form to accidents on the road? The failure to do so cannot be explained on the ground that the problem has assumed serious proportions only in recent years, for more people were killed on the roads in 1938 than in 1957. Nor can it be said that Parliament has been wholly indifferent to the plight of the road accident victim, for motorists have been obliged to insure against liability ever since 1930.

A Bill which would have made motorists strictly liable to pedestrians, without proof of fault, was in fact given a third reading by the House of Lords in 1934, though it was not proceeded with in the House of Commons.[28] It was a private

---

[27] The standard rate of industrial injury benefit is now 85s. a week: for unemployment and sickness it is 50s. This is the rate for a single man. The allowances for a wife (30s.) and for dependent children (15s. for the eldest and 7s. for each other child) are the same. Industrial injury benefit is payable only for six months, after which a workman, if still disabled, becomes entitled to a pension or gratuity, depending on the degree of his disablement. For 100 per cent. disablement a pension of 85s. a week is payable: if less than 20 per cent. a lump-sum gratuity is generally paid. This disablement benefit does not depend on loss of earning power, but it may be supplemented up to a maximum of 85s. a week so long as return to work is delayed. A person in hospital undergoing treatment is paid the full rate, and special allowances are paid to people needing constant attendance.

[28] The Road Traffic (Compensation for Accidents) Bill. Introduced by Lord Danesfort on three successive occasions, it was finally given a Third Reading on June 26, 1934: for the numerous debates on the Bill, see 84 H.L.Deb. 5s., cols. 543–584; 86 *ibid.* cols. 1041–1076; 88 *ibid.* cols. 1035–1079; 92 *ibid.* cols. 925–950; 93 *ibid.* cols. 144–165. In its final form cl. 1 of the Bill provided:

"Where bodily injury to a person is caused by or arises out of the use of a motor-vehicle on a road . . . damages shall be recoverable from the owner of member's Bill and in its earlier stages in the House of Lords had the support of the Government of the day. But this was later withdrawn. The Lords' Debates on the Bill make interesting reading. The Select Committee, to which it was referred, considered that a motor-car on the road could properly be regarded as falling within the rule in *Rylands* v. *Fletcher*, and that the obligation to compensate innocent pedestrians ought to be regarded as a duty of the motoring community as a whole rather than of the individual motorists who cause the damage.[29]

The history of this Bill suggests that a well-thought-out scheme for compensating road accident victims would attract much support in Parliament. But there are a number of reasons for doubting whether the best way of providing compensation is to impose strict liability on motorists, as this Bill would have done.

Many of the defects of the existing law governing compensation for accident injuries are not peculiar to cases where fault must be proved, but are general features of litigation itself, whatever the basis of liability.

Many of these defects stem from the opposition of interest between the parties which is a necessary feature of litigation. To relieve the plaintiff of the need to prove fault would not affect this opposition of interest between the plaintiff and the defendant (or his insurer), with all that it means in terms of cost, delay, exaggeration of contention and haggling over the quantum of damages. The delays involved in litigation work particular hardship when the claim is for loss of earnings. To achieve its purpose, compensation for loss of earnings needs to be prompt, and litigation is ill suited to this requirement. Moreover, a man disabled from work as the result of a road accident is not in a strong position to bargain with an insurance company about the amount of damages. Studies carried out in the United States have shown that accident victims who suffer serious injuries rarely recover the full

the motor-vehicle without proof of negligence or intention or other cause of action as though the injury had been caused by his wilful act, neglect or default, except where the injury was solely due to the negligence of the injured person."

Contributory negligence was to be a partial defence where the negligence of the injured person contributed to but was not the sole cause of his injuries.

[29] 88 H.L.Deb. 5s., col. 1046. It is interesting to note that the Bill was supported by Viscount Sankey and Lord Buckmaster: 84 *ibid.* cols. 551, 562.

scale of damages unless they are prepared to incur the risk and cost of litigation.[30]

Litigation would also be wasteful of the total fund available for compensation. The money spent by insurance companies in disputing and fighting claims reduces the proportion of premium income paid out in compensation. The effect of retaining litigation as the instrument of compensation would thus be to make the burden of any scheme heavier than it need be, and possibly prejudice the chance of any scheme being adopted at all.

A further objection to litigation is that compensation would take the form of a lump sum. There are all too obvious risks that a lump sum may fail to achieve its purpose when it is intended to compensate for loss of earnings in future years, which would be an important object of a compensation scheme for road accidents. That lump-sum awards often do not achieve their purpose of indemnifying an injured person against future wage loss has been shown by the American studies referred to earlier.[31] The best form of compensation for loss of earnings is clearly a periodic payment.

Litigation would also make no provision for the victim of the hit-and-run driver, since there would be no identified defendant to sue. Special provision could, of course, be made for the victims of hit-and-run drivers, as it is made in some countries at the present time, by setting up special funds for compensating them.[32] But the fact that special provision would have to be made in itself shows that private litigation is a defective and clumsy instrument for imposing on motorists generally the burden of compensating their victims.

---

[30] See the *Report by the Committee to Study Compensation for Automobile Accidents*, made to the Columbia University Council for Research in the Social Sciences (1932), pp. 91–92, 266, and the *Report of the United States Railroad Retirement Board, Work Injuries in the Railroad Industry 1938–40* (1947), pp. 12–13.

[31] *Report of the United States Railroad Retirement Board, Work Injuries in the Railroad Industry 1938–40* (1947), pp. 15, 16, 166–176.

[32] In Ontario an Unsatisfied Judgment Fund is financed by fees payable on the renewal of driving licences. An injured person who would have had a cause of action against a hit-and-run driver can apply for an order permitting him to bring an action against the Registrar for Motor-Vehicles who is thereupon treated as the defendant. Any damages awarded against him are paid out of the Fund. For details, see Lawson, *Negligence in the Civil Law* (1950), pp. 308–315.

These objections to litigation are in themselves formidable. But perhaps the most important objection of all to any proposal to solve the problem simply by imposing strict liability on motorists is that it is hardly feasible to expect damages to be paid under any system of strict liability on the present scale of common law damages for personal injuries. In a broad sense, the object of an award of damages for personal injuries is restitution, the principle governing all damage awards, but there are obvious difficulties, both theoretical and practical, in applying this principle to personal injury claims. Pain, suffering and disablement are not in themselves strictly measurable in terms of money, and any award in respect of them must necessarily, in a sense, be arbitrary. And even in the more tangible realm of financial loss, there are often so many imponderables to be weighed in calculating future loss that any award in respect of it must inevitably be a very rough estimate.[33]

Notwithstanding these difficulties the courts assess as best they can any prospective financial loss likely to result from the injuries. In addition to this, and any out-of-pocket expenses incurred up to the date of trial, the award will also include an appropriate sum for pain and suffering, disfigurement and loss of the amenities of life. An analysis of recent cases shows that a person who has suffered the very gravest injuries may expect to get as much as £10,000 over and above his past and future pecuniary loss.[34] So far as pecuniary loss is concerned, there is, in theory at least, no limit to the damages that may be awarded.[35]

The courts have also held that any damages awarded are not to be reduced by any sum received by the plaintiff under a personal accident insurance policy[36] or by any pension which he may receive from his employer.[37] This departure from the principle of restitution, which means that the plaintiff makes a profit, so to speak, out of his misfortune, is defended on the ground that the policy moneys or pension are the reward of his thrift in the one case and of his work in the other and that it would be wrong to allow the wrongdoer to reap the benefit of this.[38] The same reasoning was also invoked by the Labour Government in 1948 to justify the rule, adopted when the National Insurance scheme came into force, that only half of the value of any sickness, industrial injury and industrial disablement benefits accruing to a person under the scheme for five years after an accident is to be deducted from any common law damages awarded in respect of it.[39]

---

[33] The contingencies, in a case of permanent disability, which may be taken into account include wage fluctuations, prospects of promotion and the hazards of the job previously held.

[34] In a recent case, *Scott* v. *Musial* [1959] 3 All E.R. 193, the Court of Appeal refused to interfere with a jury award of £18,000 for general damages, though the court recognised that the award was considerably higher than awards in comparable cases by judges sitting alone. The plaintiff in this case had been taken back by his employers at his previous wage. The amount awarded therefore represented almost wholly damages for pain and suffering, loss of amenities, etc.

[35] In *Zinovieff* v. *British Transport Commission* (March 31, 1954) [1954] C.L.Y. 878, £33,000 was awarded in a claim under the Fatal Accidents Acts. This, however, was before the House of Lords held that tax liability must be taken into account in computing loss of earnings: *British Transport Commission* v. *Gourley* [1956] A.C. 185. In the United States a single plaintiff had been awarded $750,000: 20 N.A.C.C.A. L.J. (1957), p. 388, at p. 398.

These rules excluding collateral benefits in assessing damages are not easy to justify except on the theory that the function of liability in damages is penal, a theory difficult to reconcile with vicarious liability, insurance against liability and many other features of the modern law.[40]

Whatever place the common law scale of damages and these rules excluding collateral benefits may have in a system of liability based, theoretically at least, on fault, it is impossible to believe that they could be retained in a scheme for providing compensation for all accident victims, regardless of fault. It is not simply a question of holding the balance even as between the accident victim and the motorist, though this consideration alone would, I think, require some limit to be placed on the damages recoverable under a rule of strict liability. What is involved here is justice as between one road accident victim and another. There is little hope of getting any scheme adopted which does not contain some limitation on the damages recoverable. Under the law as it now is, we have a condition of feast and famine, some victims getting compensation which often far exceeds their pecuniary loss, while others get nothing but the meagre benefits of the National Insurance scheme. Even if it were decided that motorists could not be called upon to carry any heavier burden of insurance than they do at present, it would still be arguable that the fund available for compensation could be distributed among accident victims in a much more equitable way than it is at the moment.

---

[36] *Bradburn* v. *G.W. Ry.* (1874) L.R. 10 Exch. 1.

[37] *Payne* v. *Railway Executive* [1951] 1 K.B. 26.

[38] The "wrongdoer" denied this benefit is often an employer held vicariously liable for his servant's negligence.

[39] Law Reform (Personal Injuries) Act, 1948, s. 2. Both Lord Beveridge in his *Report on Social and Allied Services* (Cmd. 6404—1942), p. 101, and the Departmental Committee on Alternative Remedies (*Final Report*, Cmd. 6860—1946, paras. 44–46) had recommended that common law damages should be abated by the whole of any benefits under the National Insurance scheme, following the principle of earlier National Health Insurance Acts.

[40] The general problem of alternative remedies and the exclusion of collateral benefits in computing damages is outside the scope of this article. There is clearly a much stronger case for excluding any benefit received by a plaintiff under a life insurance policy, since this is in most cases a form of saving. Until recently sums payable under life insurance policies were the only benefits excluded from computation in claims under the Fatal Accidents Acts; other benefits, such as pensions, accruing to the dependants were taken into account. But s. 2 of the Fatal Accidents Act, 1959, now excludes any benefit, pension or gratuity from computation, thus bringing fatal accident claims in line with other personal injury claims. For an excellent general discussion of the problem, see Harper and James, *Law of Torts* (1956), vol. 2, pp. 1337–1360.

For the reasons given above I think that some other method than ordinary litigation is needed to provide compensation for road accident victims, and like others who have considered the problem, I think the best solution is to be found in an extension of the principle of workmen's compensation, with modifications suitable to the field of road accidents. This suggestion was made twenty-eight years ago by a distinguished Committee appointed by the Columbia University Council for Research in the Social Sciences to study the problem of compensation for road accidents.[41] The Columbia Committee carried out an extensive study of the social effects of road accidents and the extent to which losses were met under a system of liability for negligence. The problem is perhaps even graver in the United States than it is here, because of the greater number of accidents per head of population, the absence of compulsory insurance against liability,[42] fewer social security benefits, absence of legal aid and different rules as to costs. But there is no reason to believe that a similar study carried out in this country would not reveal the same social evils, though perhaps in a less aggravated form.

---

[41] *Committee to Study Compensation for Automobile Accidents, Report to the Columbia University Council for Research in the Social Sciences* (1932).

[42] Except in Massachusetts, where it has been compulsory since 1927. Most states have "financial responsibility" laws, under which drivers who have been involved in an accident or who have been convicted of a serious motoring offence are required to show that they will be able to satisfy a judgment up to a certain amount in respect of any subsequent accident. This is ordinarily done by taking out liability insurance.

Some of the findings of the Columbia Committee, and of a later study of accidents suffered by railway workers, I have referred to already in discussing the adequacy of lump-sum awards and the pressure that an insurance company is able to bring to bear upon an accident victim to accept reduced damages.[43] It was found this pressure tended to grow as the loss and injury became more serious.[44] Most accident victims, it was found, were wage earners with low incomes, and great hardship was often caused, even when compensation was finally paid, by the delay in getting it.[45]

The scheme recommended by the Columbia Committee followed closely the workmen's compensation model. It would have imposed a limited liability without fault, secured by compulsory insurance, on the owners of motor-vehicles for personal injuries or death caused by the operation of them. The rates of compensation for wage loss suggested by the Committee were the same as those payable under the system of workmen's compensation then in force in New York State, *i.e.*, two-thirds of pre-accident earnings with a fixed maximum and minimum. Compensation for housewives was to be calculated on the wages paid for housework, while children and other unemployed people would have been entitled to the minimum rate for injured workmen. Compensation under the scheme was to be the exclusive remedy, as it generally is under United States workmen's compensation laws.

No American state has adopted the Columbia Committee's recommendation, though the legislatures of New York, Virginia, Connecticut and Wisconsin have given it serious consideration. A great deal has been written in the United States for and against the proposal.[46] Some of the criticism has been directed at the basic principle of imposing liability without fault, especially when the injured person has himself been negligent. Others, who accept the principle as appropriate to industrial accidents, have stressed the differences between accidents in industry and accidents on the road. In the latter, they point out, there is often no business venture through which the cost of compensation can be passed on and no special relationship, as in master and servant, which both justifies a special rule and facilitates the administration of a strict rule of liability. The proposal has also been criticised by some on the ground that it would be too crushing a burden on motorists and by others on the ground that the compensation would be inadequate. Others still have argued that the scheme would encourage careless driving.

---

[43] See above, pp. 94–95.

[44] *Columbia Report* (cited above, n. 41), pp. 91–92, 266.

[45] *Ibid.* pp. 55–69, 218–235.

[46] For a recent review of the principal arguments for and against the Columbia Committee's proposal, see Fleming James, Jr., "The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge," 59 Yale L.J. (1959), pp. 408–424.

As regards the basic principle, I shall not repeat what I have already said in support of the case for imposing some form of strict liability on motorists. The inability of the motorist in most cases to pass on the cost of compensation (or, rather, the cost of the premium he pays) is not irrelevant, but it would seem to bear on the extent of the burden that he can fairly be called upon to carry rather than on the justice of the principle itself.

A good deal of the criticism of the Columbia Committee's proposal has been directed at features of it, such as the exclusion of negligence liability, the absence of any provision for the victim of the hit-and-run motorist and the system of financing the scheme by individual liability insurance, that are not necessarily involved in a comprehensive compensation scheme. Other criticisms have been more general. But rather than deal with these in detail, it would be more profitable to examine the operation of a compensation scheme, inspired partly by the Columbia Report, which is actually in force.

THE SASKATCHEWAN AUTOMOBILE ACCIDENT INSURANCE SCHEME

The only part of the common law world that has adopted a compensation scheme for road accidents is the Canadian province of Saskatchewan. Though, like the scheme proposed by the Columbia Committee, it owes its inspiration to workmen's compensation, it departs from it in some important respects, and in doing so meets some of the objections levelled at the Columbia Committee's proposal.[47]

Under the Saskatchewan scheme, which came into force in 1946, every person is insured against loss resulting from injuries sustained in a motor accident, whether he be the driver, a passenger or a pedestrian.[48] The Automobile Accident Insurance Act does not impose any absolute liability on motorists: it is the person injured who is insured against loss and the effect of the insurance is to give him the right to claim compensation, at prescribed rates, from the Saskatchewan Government Insurance Office out of a special insurance fund. This fund is financed by insurance premiums payable by the owners of motor-vehicles as a condition of registration and by small premiums payable on the grant of driving licences. The administration of the scheme is simplified by linking the period of the insurance to the period of validity of driving licences and certificates of registration, so that they expire together.

Originally, the scheme was confined to the cover described above. But in succeeding years it was soon widened to include insurance of motor-vehicle owners against collision damage, fire and theft, and insurance against common law liability, which has not been affected by the scheme. Claims for damage to or loss of a vehicle are subject to a $200 deduction, and the insurance against common law liability is limited to $10,000 for one person and $20,000 for more than one person injured or killed in any one accident, and $5,000 for damage to property in any one accident. A person injured by a hit-and-run driver can take action against the Government Insurance Office to recover the damages that he would have been able to recover from the unidentified driver up to the limit of the cover against common law liability. This comprehensive insurance is compulsory and is covered, together with the original accident insurance scheme, by a single premium. A person is free, if he wishes, to take out further cover, either with the Government Insurance Office or a private company. Any damages awarded against a registered owner or driver are reduced by the amount of any compensation which the plaintiff is entitled to under the scheme.

---

[47] The account of the Saskatchewan scheme in this article is based largely on statutes, descriptive pamphlets and other information kindly supplied to me by Mr. J. A. Waters, Chief Automobile Accident Insurance Underwriter of the Saskatchewan Government Insurance Office. See also Green, "Automobile Accident Insurance Legislation in Saskatchewan," 31 (3rd series) J.Comp.Leg. (1949), pp. 39–53, reprinted in Lawson, *Negligence in the Civil Law* (1950), pp. 315–335.

[48] The cover does not extend to persons driving under the influence of drink or drugs, to drivers without a current driving licence or to the owner of an unregistered motor-vehicle while riding in it, though in the first two of these cases death benefits are payable to dependants if the person is killed. Protection is also denied to non-residents riding in vehicles not registered in Saskatchewan. Residents of the Province are insured against accidents occurring outside the Province while riding in vehicles registered in Saskatchewan.

The benefits payable regardless of fault for personal injury and death fall into four groups: weekly benefits for loss of income, supplementary allowances intended to cover the cost of medical treatment and attendance, lump-sum payments for loss of limb, and death benefits payable to dependants.

The difficulty of computing the loss of earnings of the various victims of road accidents has been avoided in the Saskatchewan scheme by confining the weekly benefit to those gainfully employed and by paying a flat rate of benefit to all. For total disability the weekly indemnity is at present $25, and for partial disability $12.50. These benefits are payable for a maximum period of two years. The only exceptions to the rule confining the benefit to those gainfully employed are for housewives, who, if totally or partially disabled from performing their duties, are entitled to the same rates of benefit for a period not exceeding twelve weeks, and for those confined to hospital, bed or wheel-chair as the result of an accident, who are entitled to $12.50 a week for a period not exceeding a year.

Supplementary allowances are payable to cover the cost of all forms of medical treatment, subject to a maximum of $1,000. These are payable in addition to any weekly indemnity that a person may be entitled to.

The benefits payable for loss of limb take the form of lump sums specified by the Act, ranging from $500 for loss of a thumb to $4,000 for loss of both hands, both feet or both eyes. The maximum sum, $4,000, is also payable to a person who is permanently disabled from doing any work, whatever the nature of the disablement. Except in this last case, these benefits take no account of loss of earnings and are payable in addition to the weekly indemnity and supplementary allowances described above.

Death benefits also take the form of lump-sum payments, varying with the circumstances of the person killed. $5,000 is payable to the primary dependant, as defined by the Act, and $1,000 to each secondary dependant, subject to an absolute maximum of $10,000 in all.[49] If the person killed is a child, a payment ranging from $100 to $1,000 is made to the parent, depending on the child's age. The sum of $200 is also payable in every case for funeral expenses.

Claims are made on the Government Insurance Office and are ordinarily settled within a few weeks. The procedure for claiming is simple and lawyers are rarely employed except when a claim is made for death benefit in the course of winding up an estate. To facilitate the administration of the scheme and to reduce the risk of fraudulent claims, all accidents in which anyone is injured or damage apparently exceeding $100 is caused must be reported at once to the police, and notice of a claim must be lodged within fifteen days.

The basic premium rates for different classes of vehicle are fixed each year by regulation. For private passenger cars the premiums range at the present time from $5 for a model of 1948 or earlier to between $30 and $40, depending on wheelbase, for a model of 1957 or later. The explanation of this great difference in premium rates is that nearly two-thirds in amount of the claims met by the insurance fund are for collision, fire and theft.[50] The premium therefore reflects fairly closely the comparative value of models of different years. A surcharge may be imposed on dangerous drivers, but a person surcharged can appeal to a Rates Appeal Board.

Saskatchewan is a vast province, with comparatively few motor-vehicles in proportion to the mileage of roads. One must, therefore, be cautious in drawing any general conclusions from the experience of the Saskatchewan scheme. But making allowance for these special factors, it will, I think, be conceded that the premiums paid are remarkably low for the extent of the cover given. The low cost of the original personal accident part of the scheme is especially interesting. No separate premium is charged in respect of this, but an analysis of the claims met by the insurance fund shows that less than a quarter of the amount paid out goes to meet injury claims. An annual premium of $5 for every vehicle would more than cover this part of the scheme.[51]

---

[49] The " primary dependant " is the wife or dependent husband of the deceased, or, if none, the dependent children, or, if none, the dependent parent or parents. " Secondary dependants " include any dependent child or parent who is not a primary dependant.

[50] The total of all claims incurred in 1958 was $4,265,148, of which $2,626,975 represented claims for collision, fire and theft.

One reason why the Saskatchewan premiums are so remarkably low is the relatively small part of premium income that is taken up by management expenses. In 1957 and 1958 this was only 17 per cent. This may be compared with a corresponding ratio of roughly one-third in motor-vehicle insurance business in this country,[52] and an average ratio of more than a half in this class of business in the United States.[53] In comparing these figures, it should be borne in mind, too, that the number of claims in proportion to premium income under the Saskatchewan scheme is certainly much greater than in private insurance business under the fault rule, and that the expenses of the latter take no account of the costs incurred by people who prosecute unsuccessful claims.

I think the time has come for an inquiry into the possibility of introducing in this country an accident insurance scheme based on the Saskatchewan model. What we badly need at the same time is a comprehensive study of the social effects of road accidents, such as that carried out by the Columbia Committee in the United States. Whether the scheme should extend only to compensation for injuries without fault or should, like the Saskatchewan scheme, cover collision, fire, theft and third-party liability as well is a matter on which opinions will differ. The existing compulsory third-party insurance might be merged with compensation insurance, while leaving vehicle owners free to insure against other risks with private companies.

---

[51] In 1958 injury claims under the personal accident part of the scheme amounted to $956,953. At the present time there are about 300,000 motor-vehicles registered in Saskatchewan.

[52] See *Annual Abstract of Statistics, 1958*, Table 335. In 1937 the commission and management expenses of the motor-vehicle insurance business of fifty-four tariff companies came to more than 40 per cent. of premium income: *Report on Social Insurance and Allied Services* (the Beveridge Report) (Cmd. 6404—1942), p. 278.

[53] Malone, "Damage Suits and the Contagious Principle of Workmen's Compensation," 10 N.A.C.C.A. L.J. (1952), p. 44, at p. 57.

The form that compensation for personal injuries should take is again a matter on which there may be difference of opinion. If fixed awards were made for loss of limb, as in the Saskatchewan scheme, considerations of cost would probably require that compensation, apart from such awards, should be confined to indemnifying actual loss of earnings and actual cost incurred as the result of an accident.

The scale of compensation payable would depend on the amount of the premiums that motorists could be called upon to pay. If the scheme is to serve its purpose of relieving the distress caused by road accidents, it is important that the scale of compensation should not be too low. The weekly indemnity for wage-loss under the Saskatchewan scheme is less than half the average working wage.[54] This, I think, is far too low. This part of the Saskatchewan scheme costs the motorist, as I have said earlier, less than $5 a year. It ought to be possible to pay two-thirds of the wage-loss without too heavy a burden on motorists.

Another problem is whether to relate the compensation to earnings or to pay it at a flat rate, as in Saskatchewan. Flat-rate benefits present few administrative problems, but I am not convinced that the practical difficulties of relating compensation to earnings are sufficiently great to outweigh the greater justice of this alternative. An upper limit would have to be set, as it is in all systems of workmen's compensation, but subject to this it would seem to be more in accord with the notion of enterprise liability underlying such a scheme that compensation should be related to the damage caused than that each injured person should get an equal sum, whatever the extent of his loss.

Some may think that ordinary liability in negligence should cease if compensation is paid regardless of fault. This, as we saw earlier, was the view of the Columbia Committee. But it would, I believe, be a mistake to abolish the common law remedy, or at least to try to make its abolition a condition of a compensation scheme. It would be far too much to expect Parliament at the present time to abolish liability for negligence by express provision. Apart from the offence to ordinary moral sense that such a proposal would cause, to preserve the common law remedy would also meet the fears of those who think that to abolish it would encourage dangerous driving. Whether civil liability for negligence under a régime of compulsory third-party insurance in fact has any significant effect on the way people drive is very much open to doubt.[55]

---

[54] In 1956 the average weekly wage in Saskatchewan was $57.88.

But though I am against trying to abolish the common law remedy, its practical scope should, I think, be narrowed by altering the rules, described earlier, under which collateral benefits received by a plaintiff are ignored, wholly or in part, in assessing damages. I can see no justification for continuing this practice of giving a plaintiff more than his actual loss, especially since the burden of common law liability for road accidents will tend to reduce the fund available for compensating those who cannot sue at common law. This change alone would drastically reduce the number of common law claims, for if collateral benefits, including compensation under the proposed scheme, are taken into account, it will often not be worth while pursuing a common law claim, particularly where there has been contributory negligence. Consideration might also be given, if a compensation scheme were introduced, to withdrawing legal aid from running-down cases. If the scale of compensation were fairly generous, legal aid to pursue common law claims in addition could hardly be justified on grounds either of individual or social need.

If compensation were provided for all road accident victims, one might also expect that the courts would insist on more cogent proof of negligence than they do at the moment. So long as no other provision is made for compensating road victims, it is only natural that the courts should be astute to find negligence on the part of an insured motorist.[56]

---

[55] See above, p. 86.

[56] " There are few users of the road . . . who can say that they have never fallen short of the standard of care which the law demands "; Devlin J. in *Lewis* v. *Carmarthenshire C. C.* [1953] 1 All E.R. 1025, at p. 1028.

In speculating on the probable cost of a compensation scheme, as compared with the premiums we pay at the present time, it should not be assumed that the practice of insurance companies is in fact governed by the fault rule. No figures have been published in this country of the proportion of cases in which insurance companies do in fact make some payment to accident victims. But if the practice of American companies is any guide, it seems likely that some compensation is paid in most cases. The Columbia Committee discovered that this was done in over 86 per cent. of the cases where the motorist was insured.[57] Indeed, where the loss was small, the payment usually more than covered the loss suffered.[58] This was not because liability was admitted in all these claims, but because it was thought cheaper to make some payment than fight an action.

It should also be borne in mind that part of the cost of road accidents is already borne by the National Health Service and the National Insurance scheme. On the principle that a person's need should not be met twice over, any benefits received by him under the National Insurance scheme would thus reduce the amount of compensation payable.

COMPENSATION FOR INDUSTRIAL ACCIDENTS

Turning to industrial accidents, I think the argument for imposing some form of enterprise liability here is perhaps even stronger than in the case of road accidents, since the employer generally profits from the creation of the risk and is able to pass on the cost of compensation to the consumer.[59] As I explained earlier, this principle did in fact find expression from 1897 to 1948 in the Workmen's Compensation Acts, but has not been retained in the Industrial Injuries section of the National Insurance scheme which has taken their place.

---

[57] *Op. cit.*, pp. 77, 81, 86. Where the motorist was not insured, compensation was received in only 17 per cent. of the fatal cases: *ibid.* p. 86.

[58] *Ibid.* p. 266.

[59] I have dealt with compensation for industrial accidents more fully in an earlier article in this series: "Compensation for Industrial Injuries," 10 *Current Legal Problems* (1957), pp. 85–103.

It was, I believe, a serious mistake to abandon the principle of placing the cost of compensating industrial accidents directly or indirectly on the industries in which they occur. One of the principal reasons put forward for abandoning the principle was that the higher rate of accidents in dangerous industries is not the fault of the employers in them and that these industries were unduly prejudiced by the burden of compensation under the old system. The answer to this is surely that the principle of workmen's compensation, if accepted, makes the fault of an employer irrelevant. The idea underlying it is that an employer should pay for the human wear and tear which his enterprise causes in the same way as he has to pay for the wear and tear of the machinery he employs. If notions of fault are introduced, it is difficult to see how one can justify singling out industrial injuries for preferential treatment at all. Yet this is still done by the Industrial Injuries scheme, only instead of the burden of compensation in dangerous industries being borne by the employers, it is shouldered to a great extent, as I explained earlier, by employers and workmen in safer occupations. As for the heavy burden on dangerous industries under the old system, it is sufficient to say that it was and still is borne by the corresponding industries of other countries and that if an industry takes a heavy toll of life and limb this should properly be reflected in the price paid for its products.

Once the idea of enterprise liability was abandoned and accidents in industry came to be regarded as merely one of the risks covered by an insurance contribution which is the same for all, it was inevitable that compensation, too, would be paid at a flat rate and also that this rate would not greatly exceed the rates of benefit paid under the general part of the National Insurance scheme. The result is that though the benefits for industrial injuries are higher than those paid for sickness and unemployment,[60] yet in proportion to average earnings they compare unfavourably not only with the scale of compensation ordinarily paid in other countries, but also in many cases with the compensation formerly paid in this country, though this had long been criticised for its meanness. The general practice of other countries is to pay two-thirds of the wage-loss up to a fixed maximum wage which is usually higher than that of a skilled worker.[61] In this country the current rate of injury benefit for a disabled single workman is less than a third of average earnings, while even for a married man with two children it only just exceeds a half.[62]

---

[60] The standard rate of industrial injury benefit is at present 85s. For sickness and unemployment it is 50s.

With benefits as low as this, it is only to be expected that a workman should come to regard a common law claim against his employer as the only means of getting adequate compensation, and there has been an enormous increase in actions of this sort. Several changes in the law in the last fifteen years encourage these actions: contributory negligence is no longer a complete defence, the doctrine of common employment has gone, legal aid has been introduced and, last but not least, only half the national insurance benefits received by an injured workman are deducted from any damages awarded. One therefore finds much the same condition of feast and famine in compensation for industrial accidents as one does in the field of road accidents. The discrimination in treatment of injured workmen is particularly anomalous, since the employer held liable is often entirely free from blame. It is thus possible for each of two workmen who jointly engage in some foolhardy enterprise contrary to express orders to sue their common employer, if they are both injured, on the theory that the employer is vicariously liable in each claim for the negligence of the fellow workman.[63] At the same time, an entirely blameless workman who cannot prove fault is confined to the meagre benefits of the Industrial Injuries scheme.

There were many defects in the old workmen's compensation system, but most of these were the result of imposing the liability to pay compensation directly on the employer, who insured against liability. This is not a necessary feature of a compensation scheme that seeks to give expression to the notion of enterprise liability. It would have been possible, as the Saskatchewan scheme shows, to pay compensation out of a national fund while still preserving the principle of imposing the burden of compensation on the industries in which the accidents occur by premiums adjusted to the hazards of each industry. This has been done in France.[64]

---

[61] *Royal Commission on Workmen's Compensation, 1939: Minutes of Evidence*, p. 585 *et seq.*; *Report on Social and Allied Services* (the Beveridge Report) (Cmd. 6404—1942), pp. 47, 287–293.

[62] In January 1960 the average weekly wage of men over twenty-one was 270s. A married man with two dependent children gets a total benefit of 137s. under the industrial injuries scheme.

[63] *Stapley* v. *Gypsum Mines, Ltd.* [1953] A.C. 663; *Williams* v. *Port of Liverpool Stevedoring Co.* [1956] 2 All E.R. 69.

If the principle of enterprise liability for industrial accidents was restored and the scale of compensation brought into line with that paid in other countries, there would be a strong case for confining the employer's common law liability, as it is in other countries, to cases of serious personal default. The only satisfactory explanation of vicarious liability, which is, of course, a form of strict liability, is that it is itself an expression of the idea underlying enterprise liability.[65] If, therefore, the principle that an enterprise should pay for the accidents it causes finds expression in a system of workmen's compensation, there is a strong argument on grounds of common justice for excluding its other expression in vicarious liability. It is worthy of note that the introduction of workmen's compensation in this country was regarded at the time as a *quid pro quo* for the retention of the common employment doctrine.[66] Common law liability as a means of compensating injured workmen has all the defects, in terms of cost, delay, contention and lump-sum payments, that were described earlier in considering road accidents.

We do not know what proportion of injured workmen recover common law damages at the present time, but it is clear that insurance against common law liability is a heavy burden on employers in some industries. It is also clear that the management expenses of liability insurance business take up a large proportion of premium income.[67] It might well be, therefore, that if the common law remedy were restricted in the manner I have suggested, it would be possible to pay compensation to all injured workmen on a far more generous scale than at present without any additional burden on industry as a whole. Here, as in the case of road accidents, the issue is not so much justice as between workman and employer as between one victim and another.

---

[64] For details, see A. Rouast and P. Durand, *Précis de législation industrielle* (4th ed., 1951), pp. 499–562.

[65] Dr. Glanville Williams, after examining the various theories of vicarious liability, has come to the conclusion that the explanation suggested in the text (*i.e.*, enterprise liability) is not only the most persuasive, but is the one that best fits the existing law: "Vicarious Liability and the Master's Indemnity," 20 M.L.R. (1957), p. 437, at p. 443.

[66] See *loc. cit.*, in n. 59, above, p. 101

[67] Roughly 40 per cent.: *Annual Abstract of Statistics, 1958*, Table 335.

The matters I have dealt with in this paper are perhaps more appropriate to a book than a short article, and I am conscious of having left many points unanswered. My purpose has been to stimulate discussion rather than try to suggest any final solutions.[68] The chief obstacle to reform is not, I am sure, any enthusiasm for the present state of the law, but simply a lack of attention to the problem.

[68] Suggestions have been made in the United States that compensation should be assured to road accident victims by obliging motorists to carry loss insurance, under which the victim would be directly indemnified by the motorist's insurance company; see Green, *Traffic Victims—Tort Law and Insurance* (1958). Loss insurance of this sort would almost certainly be better than liability insurance under a rule of strict liability. It would, however, cost very much more than a scheme of the Saskatchewan type, as well as retaining many of the defects of litigation described in the text, such as delay, contention and lump-sum payments.

SOME RECENT DEVELOPMENTS IN THE LAW OF MASTER AND SERVANT

G. J. Webber

The disposition of the House of Lords, at the present time, is to limit employers' liability. The Court of Appeal has recently taken an enlightened view, in the employee's favour, of the circumstances justifying dismissal for disobedience. The Crown's right to dismiss at pleasure, the High Court has held, remains unaffected even when a civilian employee is engaged with a specified period of notice. Finally, the House of Lords again fulfils its constitutional office of explaining away a judicial dictum, followed for fifty years, by the process of judicial reinterpretation. Lord Somervell has made weighty observations upon reasonable care as a question of fact uninfluenced by the dicta of judges in previous cases, lest the precedent system "die of a surfeit of authorities."

Several questions are left open by the decision of the House of Lords in *Davie* v. *New Merton Board Mills*[1] that an employer, who buys from a reputable source—in that case a supplier, though had it been the manufacturer, the principle would have been the same[2]—a tool or appliance whose latent defect he has no means of discovering, has discharged his duty of reasonable care and is not responsible for an injury thus caused to his employee.

Careless Workmanship and Employer's Liability

What if the employer ordered tools to be made to his own design and there was carelessness in the workmanship? The hesitations both of Viscount Simonds and of Lord Reid[3] suggest that the employer may have to bear the responsibility. It is conceded that he would be responsible for a fault in the design due to his own lack of reasonable care. May it not be argued that if the fault be carelessness of workmanship on the part of the manufacturer in complying with the employer's design, the employer is liable for the manufacturer who is acting in this respect as his agent? On the other hand, the trend of the House of Lords has not been in the direction of extending the liability of employers.[4]

---

[1] [1959] A.C. 604; [1959] 2 W.L.R. 311. See also G. J. Webber, "Safety of Tools and Employer's Liability," 12 *Current Legal Problems* (1959), p. 56.

[2] [1959] A.C. 604, at 629, *per* Lord Morton; at 648, *per* Lord Tucker.

[3] *Ibid.* at 646, *per* Lord Reid on "a wide sphere . . . left for the further development of the law."

EMPLOYER'S LIABILITY IN TORT

Both the arguments[5] and the speeches in the *Davie* case proceeded upon the basis that " employer's liability is part of the general law of tort." The statement of claim was framed in negligence. " A master's duty to his servant," observed Lord Reid, " with regard to the safety of plant should, I think, be regarded as part of the law of tort."[6] Could this case have been framed in contract and, if so, would the contractual duty have been higher?

It is always possible for master and servant to make in the contract of service an *express* stipulation that the master will be responsible if his servant is injured by a defective tool. In practice, there is agreement to this type of stipulation only in consequence of collective bargaining between associations of employers and employees in a given trade or industry; and on this particular issue no collective bargain has been made. Thus, had the argument in the *Davie* case proceeded upon the employer's *implied* duty in contract, that duty could not have been placed higher than his duty in tort.[7]

EMPLOYER'S ALTERNATIVE LIABILITY IN CONTRACT

The question of principle remains. Is the employer's duty of care grounded *exclusively* in tort and in the relationship of master and servant, or—in the absence of express stipulation—is it also an implied term of the contract of service? In *Matthews* v. *Kuwait Bechtel Corporation*[8] the question was not merely theoretical.

---

[4] See C. Grunfeld, "Employers' Liability: A Phase of Contraction," 22 M.L.R. (1959), pp. 428–433. *Cf.* the Court of Appeal in *Riverstoke Meat Co. Pty. Ltd.* v. *Lancashire Shipping Co., Ltd.* [1960] 2 W.L.R. 86.

[5] [1959] A.C. 604, at 610 and 613.

[6] *Ibid.* at 642. *Cf. ibid.* at 617, *per* Viscount Simonds.

[7] *Matthews* v. *Kuwait Bechtel Corporation* [1959] 2 Q.B. 57, 63; see below.

Matthews, a foreman millwright, made in England a contract to go into service in Kuwait. The contract, which was to be construed in accordance with English law, contained no reference to any duties of care relating to premises. Matthews fell into a trench while stepping back to avoid a load swinging from a crane. Could he obtain leave to serve a writ out of the jurisdiction in order to sue his employers, who resided in Panama, for the injury suffered abroad? No writ in tort can be served out of the jurisdiction[9]; a writ in contract under specified circumstances may be.[10] He obtained leave to sue for breach of the duty to provide safe plant, premises, equipment and system of work implied in his contract of employment made in England.

In his experience, said Sellers L.J., the claim could be made either in tort or in contract and had frequently been so pleaded without exception taken.[11] He cited the similar views expressed by Viscount Simonds and Lord Reid in the *Davie* case.[12]

Moreover, the reasoning, which in *Lister* v. *Romford Ice & Cold Storage Co., Ltd.*[13] led to the conclusion that an employee is under an implied contractual obligation of care, applied " equally and even more obviously to the case of the obligation of an employer." In that case Lord Radcliffe declared:

> " Since in modern times the relationship between master and servant . . . is inherently one of contract, it seems to me entirely correct to attribute the duties which arise from that relationship to implied contract. . . . The same wrongful act may be made the subject of an action either in contract or in tort at the election of the claimant. . . ."[14]

That the claim existed in both contract and tort was, in the words of Viscount Simonds, " trite law "[15]; and none of their lordships accepted the powerfully reasoned contention of Denning L.J. (as he then was) that an employer's liability can only be founded in tort.[16]

---

[8] [1959] 2 Q.B. 57. And see George J. Webber, " Servant Suing Master for Negligence in Contract," 22 M.L.R. (1959), p. 521.

[9] R.S.C., Ord. 11, r. 1 (*ee*).

[10] R.S.C., Ord. 11, r. 1 (*e*).

[11] [1959] 2 Q.B. 57, at 63.

[12] [1959] A.C. 604, at 619 and 642.

[13] [1957] A.C. 555.

[14] *Ibid.* at 587.

[15] *Ibid.* at 573.

Dismissal for Disobedience

Under what circumstances may a servant's mere disobedience constitute justification for his dismissal?

The rule, as formulated in Halsbury, that "wilful disobedience to the lawful and reasonable order of the master justifies summary dismissal" [17]—even with the qualifications later given—appears, from the recent decision of *Laws* v. *London Chronicle* (*Indicator Newspapers*) *Ltd.*[18] to be somewhat too widely stated. In that case, the plaintiff was summarily dismissed for disobeying what was, in fact, a lawful and reasonable order of her employer. Employed as an "advertisement representative" at £10 a week with one month's notice on either side, she had one day accompanied the advertisement staff to a business meeting in the room of the chairman and the managing director. An altercation arose; the advertisement manager invited the plaintiff and another junior to leave the room with him and, although the chairman said: "Stay where you are," they left. Summarily dismissed, the plaintiff was awarded in the county court £45 damages for wrongful dismissal, and costs. An appeal was dismissed.

Disobedience of any lawful order, it was argued, justified summary dismissal. Typical of the previous cases was *Turner* v. *Mason*,[19] where a domestic servant, against her employer's order, had absented herself for a night to visit her mother who was sick and in danger of death. Alderson B. conceded that there might be exceptions to the rule, but only "where the servant apprehends danger to her life, or violence to her person. . . . But the general rule is obedience and wilful disobedience is a sufficient ground of dismissal." [20]

---

[16] *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852, 868; *Romford Ice & Cold Storage Co.* v. *Lister* [1956] 2 Q.B. 180, 187–190; and see 22 M.L.R. (1959), pp. 524, 525.

[17] *Laws of England* (3rd ed., 1958), Vol. 25, p. 485, para. 933.

[18] [1959] 1 W.L.R. 698; and see J. C. Wood, "The Disobedient Servant," 22 M.L.R. (1959), p. 526.

[19] (1845) 14 M. & W. 112, 115.

[20] *Ibid.* at 118.

This rigidity, it might have been thought, was hardly in accord with modern notions; but in 1930, these dicta of Alderson B. were approved by the Judicial Committee of the Privy Council in *Bouzourou* v. *The Ottoman Bank*,[21] where, in an action for wrongful dismissal, it was held that ignorance of the Turkish language and the hostile attitude of the Turkish civil authorities could not justify the refusal of a Christian Turk to be transferred to a job in Mersina (in Turkish Asia Minor).

On the other hand, in *The Ottoman Bank* v. *Chakarian*,[22] an Armenian and Turkish subject who fled from Constantinople after the Ottoman Bank had refused his request, made on the ground that his life was in danger there, to be transferred to a branch outside Turkey succeeded in an action for wrongful dismissal; on the evidence, his personal safety was in real danger in Constantinople and the order to remain there was not a lawful order.

In *Spain* v. *Arnott*[23] a farmer ordered his servant to go with the horses a distance of a mile before eating his dinner which was then ready. Lord Ellenborough said: "The question really comes to this, whether the master or the servant is to have the superior authority."

In *Gallo* v. *Brouncker*[24] Parke J. told the jury that there was an implied agreement that "if there was any *moral misconduct*, either pecuniary or otherwise, *wilful disobedience*, or *habitual neglect*, the defendant should be at liberty to part with the plaintiff."

In *Edwards* v. *Levy*,[25] decided in 1860, the law was stated with less severity and in terms which can be applied today. A musical critic was late in coming to the office of the proprietor of the *Daily Telegraph* to obtain an admission card for an opera and, after angry words had passed between the parties then and the next day, was dismissed. "Habitual neglect," said Hill J., "would be a good ground for dismissal, but not *occasional* neglect." Similarly in respect of habitual insolence and occasional insolence. The jury were asked: " Has the plaintiff been guilty of such insulting and insubordinate conduct as to be incompatible with the continuance of the relationship subsisting between him and the defendant? "; and they found for the plaintiff.

---

[21] [1930] A.C. 271, 276.

[22] [1930] A.C. 277, 283.

[23] (1817) 2 Stark. 256, 258.

[24] (1831) 4 C. & P. 518, 519–520.

[25] (1860) 2 F. & F. 93, 95, 97. *Cf. Proctor* v. *Bacon* (1886) 2 T.L.R. 845.

In *Re Rubel Bronze & Metal Co.* v. *Vos*[26] McCardie J. re-examined the old cases. Vos was appointed general manager of the company for three years; after two years, the company " suspended " him, pending inquiry into his efficiency, appointed another person to take charge of his work, took away his keys and required him to deliver up his cash. He elected to treat the contract as repudiated and claimed damages for wrongful dismissal. An arbitrator's award of £650 was affirmed. The underlying basis of the action, said McCardie J., was that " the servant had, in substance, refused to fulfil his essential obligations under the contract; whereby the master was entitled to treat the contract as ended. . . . Wrongful dismissal is, I think, a mere illustration of the general legal rule that an action will lie for unjustifiable repudiation of a contract."

Dismissal for Misconduct

It is convenient to consider, together with disobedience and its effect, the modern meaning of misconduct as a ground for dismissal, for both exemplify the same underlying reasoning and both are considered in the *Laws* case.

The criterion of misconduct is stated by Lord James in *Clouston & Co., Ltd.* v. *Corry*.[27] The manager of a company's grain and produce department was dismissed. The grounds alleged were: first, disobedience of orders and purchasing of goods contrary to orders; secondly, a previous arrest and fine in a street in New Zealand for drunkenness, bad language and disorderly conduct. The first ground was abandoned; the facts of the second were virtually admitted. In an action for wrongful dismissal, the jury found for the plaintiff. The Judicial Committee were of opinion that the verdict was so unsatisfactory that it ought not to be maintained and ordered a new trial. Lord James said:

---

[26] [1918] 1 K.B. 315, 321.

[27] [1906] A.C. 122, 129; and see Halsbury, *op. cit.*, Vol. 25, p. 485, para. 934, where a summary of Lord James' proposition is stated as the rule.

> "There is no fixed rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal."

In the *Laws* case [28] Lord Evershed M.R., referring to *Edwards* v. *Levy* [29] and *Clouston & Co.* v. *Corry*,[30] declares that the question must be "whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service." This is nearer the language of McCardie J. than that of Lord James. He proceeds:

> "It is no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard—a complete disregard—of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally."

In this passage Lord Evershed, it is submitted, is qualifying and developing the law as hitherto understood. The proposition he puts forward, not as a rigid rule but as "generally true." The order, the breach of which justifies summary dismissal, he characterises, not merely as "lawful," but as "reasonable" and "proper." The breach is not simply of a condition of service but of an "essential" condition: one that strikes at the "relationship" between the parties, and "fundamentally."

This, it is submitted, is a clear and more rational criterion, and one more consistent with present-day ideas and practice. It is not accurate, as the county court judge had said, that to justify dismissal for an act of disobedience or misconduct, the act had to be " of a grave and serious nature," although this appears to be the basis upon which, in building and other industries, dismissal of manual workers frequently proceeds.

---

[28] [1959] 1 W.L.R. 698, 700.
[29] (1860) 2 F. & F. 94.
[30] [1906] A.C. 122, 129.

" One act of disobedience or misconduct can justify dismissal," Lord Evershed declares, " only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract, or one of its essential conditions; . . . the disobedience must at least have the quality that it is ' wilful ': it does (in other words) connote a deliberate flouting of the essential contractual conditions." [31]

Again, in this context, the term " wilful " appears to add to the fact of disobedience something in the nature of defiance.

On the facts in the *Laws* case, when her immediate superior walked out and asked her to follow, and the managing director said: " Stay where you are," the plaintiff was put in a very embarrassing position. Her conduct, said Lord Evershed, did not amount to " such a deliberate disregard of the conditions of service " as justified summary dismissal.

This decision (with which Lord Jenkins and Willmer L.J. agreed) will be of importance in industrial relations. It may also have some bearing upon the law administered by the statutory authorities under the National Insurance Acts by which a person who has lost his employment through " misconduct " must be disqualified from receiving unemployment insurance benefit for six weeks or such shorter period as for good cause they think fit.[32]

In the recent case of *Acklam* v. *Sentinel Insurance Co., Ltd.*[33] the city branch manager of an insurance company, summarily dismissed while his contract still had fifteen years to run, recovered £15,750 damages before Salmon J. He had claimed £45,618—the equivalent of salary until 1970, bonus, commission and pension rights—on the ground that, save in special circumstances, his contract could not be terminated before he was sixty-five. The company asserted that it was entitled to dismiss for misconduct; the appointment was subject to one month's notice on either side, though the company was not to exercise its right except for misconduct or negligence, or if his quota fell below a certain level. Three types of misconduct were alleged: disobedience of instructions given by the general manager and the area manager, spending excessive time over lunch and away from the office, and failure to give help or instructions to the company's direct salesmen.

---

[31] [1959] 1 W.L.R. 698, at 701.

[32] National Insurance Act, 1946, s. 13 (2) (*a*). And see Commissioner's decisions R.U. 24/55; R.U. 14/56; R.U. 35/58. See also Halsbury, *op. cit.*, Vol. 27, p. 732, para. 1326, note (*k*).

[33] *The Times*, December 17, 1959; it is understood to be under appeal; *cf.* the House of Lords in *McClelland* v. *Northern Ireland General Health Services Board* [1957] 2 All E.R. 129.

The plaintiff was a man of great experience and ability, Salmon J. found. He had been a success with the company for many years before his new contract in 1957 according to which his duties were " to appoint and supervise all agencies in the City and canvas for proposals of life assurance with the company." Friction arose when the general manager made a change in the function of the City office, whereby inspectors and salesmen were to sell insurance not in the City but in the suburbs and home counties and when a branch manager, fourteen years his junior, was appointed Metropolitan area manager. Mr. Acklam, having been given an opportunity to resign, was eventually dismissed in 1959.

Salmon J. found no case made out on the spending of excessive time away from the office; he was on the company's business. Nor was he under any legal duty to go out with the new inspectors into the suburbs or the home counties; his engagement was to look after brokers in the City. The serious allegations that had been made about entries in respect of business expenses were found to be the result of misunderstanding rather than any intention to cheat the company.

Damages were difficult to compute. On agreed figures that he would have been able to earn £4,000 a year until he was sixty-five, actuaries had calculated that the present value up to sixty-five, less tax,[34] was £25,750. As for the contingencies of life to be put on the other side of the balance—*e.g.*, death by running down, leaving the company of his own accord, the falling off of business, potential future earnings—Salmon J., omitting damages for pension, assessed this figure at £11,500, something under one-half of the actuarial value of loss of salary.

---

[34] See *Beach* v. *Reed Corrugated Cases, Ltd.* [1956] 2 All E.R. 652, 657, 658, *per* Pilcher J., following *British Transport Commission* v. *Gourley* [1956] A.C. 185.

For loss of pension, the present value was £4,250; this was after taking into account the fact that the plaintiff had exercised his option (upon determination of his service with the company for any reason other than death or retirement) to take a refund of all his contributions to the company pension scheme. On this issue it is arguable that, having elected to take the refund of his contributions, he had no further remedy.

CROWN SERVANTS

The recent decision of Diplock J. in *Riordan* v. *War Office*[35] makes it abundantly clear that, when a civilian employee is employed on the terms that, before discharge, a specified period of notice shall be given, the Crown's right to dismiss at pleasure is not excluded. The position of a Crown servant is one of status rather than of contract. It seems fair that the right to dismiss at pleasure should, upon appointment, be made explicit to every such employee.

The Army Council, under powers delegated by letters patent, make Regulations[36] on the employment of civilian and unestablished employees. The terms of the Regulations are mutually binding and the employee is required, before his engagement, to sign a statement assenting to them, in a way analogous to the formation of a contractual relationship. Among the Regulations are specified periods of notice—a fortnight for an employee of Riordan's grade. Riordan had some trouble with the stores foreman, his immediate superior. No misconduct was alleged. He filled up a form "Notice of Termination of Employment" and, without signing or dating it, handed it to the stores superintendent saying that he wished to resign and insisting that the resignation be put to the commanding officer. The notice was passed on to the officer in charge, to await the return of the commanding officer the following Monday. Meanwhile, one hour after handing in the form on Friday, Riordan telephoned the officer and sought to withdraw the notice. "Too late," he was told; and on Monday the commanding officer accepted the resignation, terminating Riordan's services on the Friday of that week—seven days after Riordan's resignation had been handed in. Riordan claimed damages for wrongful dismissal. The amount involved was ten days' pay—he had been given four days' notice—but the principle in issue was important. The War Office alleged successfully that he was not entitled to notice and that, in the alternative, he had resigned.

---

[35] [1959] 1 W.L.R. 1046; see Leo Blair, "The Civil Servant—A Status Relationship," 21 M.L.R. (1958), p. 261, particularly pp. 265, 266, 274, and C. Grunfeld, "Civil Servants: Insecurity of Tenure," 23 M.L.R. (1960), p. 194.

[36] War Department (Outstations) Civilian Staff Regulations (1950).

The Sovereign has the right to dismiss at pleasure, said Diplock J., citing Goddard L.J. (as he then was) in *Inland Revenue Commissioners* v. *Hambrook*[37]; restriction of this right, otherwise than by statute, is probably "void as contrary to public policy."[38] The Regulations, even though they were "sufficiently analogous to a contractual relationship" to be construed as one would the terms of a contract of employment,[39] were void in so far as they purported to exclude the right of dismissal; for there was no express provision in the letters patent authorising the Army Council to abandon the Crown's prerogative right to dispense with services at pleasure, even if (and it is doubtful) the Queen could, by letters patent, abandon this prerogative. In any event, the "Regulations" were, in law, "no more than instructions by the Army Council"[40] and gave no cause of action to Riordan.

Diplock J. considered, *obiter*, the submission that the plaintiff was not dismissed but resigned. Resignation by a Crown servant is analogous to resignation under a contract—"a unilateral act requiring no acceptance by the other party, and, like a notice to quit a tenancy, once given, it cannot in my view be withdrawn save by mutual consent."[41] Already before Riordan revoked his resignation, it had been received by the stores superintendent—or at any rate, by the superior officer to whom he handed it—as agent for the commanding officer. It was too late to withdraw.

---

[37] [1956] 2 Q.B. 641, 649, 653.
[38] Citing Robertson, *Civil Proceedings By and Against the Crown* (1908), p. 359.
[39] [1959] 1 W.L.R. 1046, at 1053.
[40] *Ibid.* at 1050.
[41] *Ibid.* at 1054.

In *Terrell* v. *Secretary of State for the Colonies*[42] a judge in Malaya, whose appointment ended upon abeyance of the post, was held to be in the same position as any other Crown servant rather than that of a judge of the United Kingdom who, under the Act of Settlement, has security of tenure. Goddard L.C.J. observed:

> "Once it is established that the Crown has power to dismiss at pleasure, that right cannot be taken away by any contractual arrangement made by an executive officer or department of state."

Once a person is appointed at pleasure, no correspondence before or after appointment can affect its terms.

In *Inland Revenue Commissioners* v. *Hambrook*[43]—an action by the Crown for damages for the "loss of services" of a tax officer (an established civil servant) who had been injured by the defendant's motor-car and off work for ten months—Lord Goddard, refusing to allow the *actio per quod servitium amisit* (which should not be extended, being an anomalous survival from the time when the master had a proprietary interest in his servant),[44] said that in any event there was a fundamental difference between the ordinary private relationship of master and servant and the relation between the Crown and an established civil servant whose duties are public and partly statutory, who is remunerated out of moneys provided by Parliament[45] and "is more properly described as an officer in the civil employment of Her Majesty."[46] The office was of status rather than contract; salary might be recovered upon a *quantum meruit*, but there could be no action for wrongful dismissal. "It is settled beyond controversy that the Sovereign can terminate at pleasure the employment of any person in the public service, except in special cases where it is otherwise provided by law. . . . There does not appear to be a definite and clear decision as to whether there is a contract of service between the Crown and the officers in the Civil Service." [47]

---

[42] [1953] 2 Q.B. 482, 497, 498, 499.

[43] [1956] 2 Q.B. 641, 652 *et seq.*

[44] But see *Commissioner for Railways* v. *Scott* (1959) 33 A.L.J.R. 126.

[45] [1956] 2 Q.B. 641, at 653, 654.

[46] *Ibid.* at 653. *Cf. Att.-Gen. for New South Wales* v. *Perpetual Trustee Co.* [1955] A.C. 457, at 489: "Persons in the public service are not servants of the Crown in such a sense that the ordinary law of master and servant determines the relation of the parties."

EMPLOYER'S DUTY OF CARE ON PREMISES OF ANOTHER

"I deprecate any tendency to treat the relation of employer and skilled workman as equivalent to that of a nurse and imbecile child," said Viscount Simonds in *Smith* v. *Austin Lifts, Ltd.*[48] "Skilled" is the keyword.

The *Smith* case, though decided before the Occupiers' Liability Act, 1957, came into operation, is of note and contains a valuable exposition by Lord Denning of the respective duties to employees of occupier and employer for the safety of premises.

A lift maintenance company sent a fitter to overhaul a lift at premises where the machine-house was on the roof and access was by a fixed, almost perpendicular, iron ladder and thence through double doors, the base of which was 11½ feet above roof level. Often there, he knew the left-hand door was defective, for the hinge was corroded and broken. He had told his employers and they had four times informed the occupiers, but without avail. He had tied the doors together with wire because they could not be locked. On a later visit, the left-hand door had been jammed by the occupiers or their agents, and the right-hand door left open. Having climbed the ladder, he tested the left-hand door. It seemed safe, and first grasping it low down, he then grasped it higher up; it gave way; he lost his balance, fell and was injured. Oliver J. held employers and occupiers both liable—20 per cent. and 80 per cent. respectively. The Court of Appeal held that they were not. The House of Lords restored the judgment of Oliver J.

An unusual danger was created which the occupiers knew or should have known, and which they probably created. Warned about the doors, they should have taken steps to remedy them. The employee, who was an invitee, did not have " full appreciation of the danger " within the rule stated by Lord Porter in *London Graving Dock Co., Ltd.* v. *Horton*.[49] The employers also fell short of their duty of reasonable care. They should themselves have insisted on the repair, said Lord Morton, or on being themselves allowed to repair the door.

---

[47] [1956] 2 Q.B. 641, at 653; *cf. Reilly* v. *The King* [1934] A.C. 176, 180; and see Gareth H. Jones, "Per Quod Servitium Amisit," 74 L.Q.R. (1958), p. 39, at pp. 53, 57 *et seq.*

[48] [1959] 1 W.L.R. 100, 105, emphasising the principle *per* Lord Oaksey in *Winter* v. *Cardiff R. D. C.* [1950] 1 All E.R. 819, at 823.

The occupiers were under a duty to take reasonable care to see that the means of access *which they had provided* was reasonably safe.[50] How the door became jammed there was no direct evidence. The jamming was a direct consequence of the want of repair and the injury was a direct consequence of the occupier's negligence in not repairing the door. Although the plaintiff knew all about the defect, he did not know all about the danger arising from it.

> " If he was in any way mistaken about the danger, so that the state of affairs was in fact more dangerous than he thought it was, then he can recover. . . . But if he truly measures the risk, saying: ' No matter how careful I am, it is very likely I shall fall,' and still goes on, he cannot recover." [51]

This is the crucial contrast that Lord Denning draws between Smith's state of mind and Horton's state of mind. He thought that Horton, who had so fully appreciated the risk as to complain of it to his own employers, could today have successfully sued them for failing, either to require the occupiers to make the staging safe, or to withdraw their men from using it.[52] Full knowledge of the danger would have been no defence.[53] (In 1948, when the action was brought, it was thought that employers had no responsibility for the safety of premises to which they sent their men.)

---

[49] [1951] A.C. 737, 744. See Gerald Dworkin, " The Double Demise of *Horton's* case," 22 M.L.R. (1959), p. 433.

[50] [1959] 1 W.L.R. 100, at 115. In the window-cleaning cases, the householders did not provide means of access, leaving it to the window-cleaner to provide his own safeguards. Hence they were not liable. *Christmas* v. *General Cleaning Contractors* [1952] 1 K.B. 141; *General Cleaning Contractors* v. *Christmas* [1953] A.C. 180; *Bates* v. *Parker* [1953] 2 Q.B. 231.

[51] [1959] 1 W.L.R. 100, at 116.

[52] *Ibid.* at 117.

[53] *Smith* v. *Baker* [1891] A.C. 325.

> "Employers who send their workmen to work on the premises of others cannot renounce all responsibility for their safety."[54]

Lord Denning cites *General Cleaning Contractors* v. *Christmas*[55] on the duty to exercise reasonable care in devising a safe system of work; and *Wilson* v. *Tyneside Window Cleaning Co.*[56] on the criterion of reasonable care. When the workman reported to his employers that the door was broken, they ought to have done something beyond reporting the defect to the occupiers. "Having done nothing, they cannot escape liability."[57]

The principles in *Smith's* case were applied by Lord Parker C.J. in *Mace* v. *R. & H. Green & Silley Weir, Ltd.*[58] (an action which was brought six years after the event). A boilermaker, employed by ship repairers, was told by his charge-hand to open the manhole doors in the floor of one of the holds of a ship while the ship was still unloading. Ascending a ladder from the hold to the 'tween deck, he slipped and fell; his foot caught a rope wound round one of the pumps. He sued his employers for negligence and the shipowners for breach of the Docks Regulations to provide safe means of access to his place of work. Lord Parker said:

> "A duty to take reasonable care is always there but the performance of it will vary according to all the circumstances including the question whether the premises are in the occupation and control of another person."[59]

He held that although the rope was a danger, thus rendering unsafe the means of access, considering that the ship was a modern one, the shipowners of good repute, and the men experienced in the work, the employers were not in breach of reasonable care in not making an inspection but were entitled to assume, in the absence of notice, that the premises were safe and that nothing had been done to make them unsafe. Against the shipowners the plaintiff succeeded; the clearing up was ancillary to, and part of, the business of unloading, and they were in breach of the Docks Regulations on safety of access.

---

[54] [1959] 1 W.L.R. 100, at 118.
[55] [1953] A.C. 180.
[56] [1958] 2 Q.B. 110.
[57] [1959] 1 W.L.R. 118.
[58] [1959] 2 Q.B. 14.
[59] *Ibid.* at 21.

> " Ship repairers on a ship doing a hundred and one jobs during the course of the turn round of the ship must be entitled to assume, in the absence of notice of some kind . . . that the premises . . . are safe and that those who have been and are working there have not done anything to make them unsafe." [60]

Lord Parker followed the decision of the Court of Appeal (of which he was a member) in *Wilson* v. *Tyneside Window Cleaning Co.*,[61] which was approved by the House of Lords in *Smith* v. *Austin Lifts, Ltd.*[62] In that case a window cleaner of fifty-six, with a life-long experience, was cleaning from the outside a heavy window twelve feet from the ground when a handle, by which he was supporting himself, gave way. He fell and was injured. He had cleaned the window in the same way three months before; he knew that window well, that the woodwork was rotten and that it was not safe to trust handles. He never received any safety instructions; but had been told that he need clean no window which he considered unsafe. Handles coming off were frequent causes of accidents. His employers, it was said, should have inspected the premises from time to time and from time to time should have issued warnings to their employees. Donovan J. dismissed the action and his decision was affirmed.

> " If a master sends his plumber to mend a leak in a reputable private house," said Pearce L.J., " no one could hold him negligent for not visiting the house himself to see if the carpet in the hall creates a trap." [63]

Parker L.J. (as he then was) preferred to regard the employer's duty of reasonable care to his servant at common law not as a tripartite duty—*i.e.*, to provide safe premises, safe tools and a safe system of working—for, if looked at in that way, questions would arise how far the duty extended to premises not in the employer's control, or to tools bought from reputable suppliers and manufacturers. He said, citing Lord Herschell in *Smith* v. *Baker*[64]:

---

[60] *Ibid.* at 22.
[61] [1958] 2 Q.B. 110.
[62] [1959] 1 W.L.R. 100.
[63] [1958] 2 Q.B. 110, at 121.

> "I prefer to consider the master's duty as one applicable in all circumstances, namely, to take reasonable care for the safety of his men."[65]

Stated comprehensively, there is a single duty in all cases—one of reasonable care; what constitutes reasonable care varies in each individual case. There was no suggestion here that the building was old, dilapidated or affected by war damage. Nor was there in the trade any practice either of private inspection or of general instructions on how to clean windows. The duty of reasonable care does not demand "a repeated warning to skilled men in a case at any rate such as this, where the dangers involved are patent."[65a]

REASONABLE CARE A QUESTION OF FACT

That reasonable care is not a question of law but always a question of fact, irrelevant of precedent, is self-evident. Yet, there is a danger that, in deciding whether reasonable care has been used, a judge may be influenced by previous decisions. The House of Lords has recently found it necessary to reaffirm this principle. Its importance is twofold. First, its reaffirmation should help to prevent the law from becoming stereotyped.

> "What is 'a proper system of work,'" said Lord Denning, "is a matter for evidence, not for law books. It changes as the conditions of work change. The standard goes up as men become wiser. It does not stand still, as the law sometimes does."[66]

Secondly, it is an attempt to prevent previous decisions from being applied to later cases as if they were decisions of law, whereas they are to be regarded as decisions of fact based upon propositions, not of law, but of good sense. In this attempt, the courts are not always successful in face of the tendency to apply observations made upon one set of facts to another set of facts. Moreover, the view that the Court of Appeal or the House of Lords may express upon the standard of care in a given set of circumstances, inevitably tends to influence the trend of subsequent decisions. In *Qualcast* (*Wolverhampton*) *Ltd.* v. *Haynes* the House of Lords reversed in favour of the employers the decision of the Court of Appeal [67] upon the measure of the employer's duty.

---

[64] [1891] A.C. 325, at 362.

[65] [1958] 2 Q.B. 121, at 124.

[65a] *Ibid*. at 126.

[66] *Qualcast* (*Wolverhampton*) *Ltd*. v. *Haynes* [1959] A.C. 743, 760, 761.

Haynes, a moulder all his working life, had been employed for some three months at a foundry. His foot was injured when molten metal slipped on to it from a ladle he was holding. His employers kept a stock of protective spats but he was not wearing any at the time; he never did, not even since his return after the accident. He could have had them for the asking but express advice to wear them was normally only given to learners. The county court judge said that the plaintiff was so experienced as to need no warning and that there was no negligence on the part of the defendants; but, regarding himself as bound by the authorities cited, he held the employers one-quarter to blame and the plaintiff three-quarters. In the Court of Appeal, Parker L.J. (as he then was) said:

> " In an operation of this sort, there is a risk, and a risk of serious injury . . . ; and it seems to me perfectly clear, in those circumstances, that there is a duty on employers not only to have protective clothing available but to inform anybody coming into their employment that they have got that equipment, and to take steps to educate the man to wear the equipment for his own safety." [68]

A reasonable proposition, one would have thought, with respect. But, in the House of Lords, Lord Radcliffe said that the courts should be " circumspect in filling out that duty " (*sc.* of providing an article of safety equipment) " with the much vaguer obligations of encouraging, exhorting or instructing workmen or a particular workman to make regular use of what is provided." [69] But why, with respect, is it a " much vaguer " obligation? And why should not the two duties go together?

---

[67] *Haynes* v. *Qualcast* (*Wolverhampton*) *Ltd.* [1958] 1 W.L.R. 225 (Lord Evershed M.R., Parker and Sellers L.JJ.).

[68] *Ibid.* at 232.

Lord Somervell gives a timely warning upon the precedent system. Now that actions for negligence are generally tried without a jury, " the distinction between the function of judge and juries is blurred." [70] He continues:

> " A judge naturally gives reasons for a conclusion formerly arrived at by a jury without reasons. It may sometimes be difficult to draw the line, but if the reasons given by a judge for arriving at the conclusion previously reached by a jury are to be treated as ' law ' and citable, the precedent system will die from a surfeit of authorities."

Whether, assuming a duty to provide safety equipment, there is a duty to advise everyone upon its use is a question on the evidence, he said. Moreover, the plaintiff succeeded in the county court upon a point not pleaded—*i.e.*, the failure to advise him to wear spats—and failed on the case he raised—*i.e.*, the construction of a gangway. For this reason, Lord Somervell thought, inferences against the defendants should not have been drawn which, had the point been pleaded, might have been answered in evidence; when such a point is allowed to be taken in the Court of Appeal, the pleadings should be amended.[71]

Lord Denning gave a lucid and significant exposition of the judge sitting as a jury, and concluded that the Court of Appeal should have found that the employers were not negligent, as the county court judge would have done if he had not felt bound by authority. An appeal being a rehearing, if the Court of Appeal would not have come to the same conclusion, it need not accept the inferences of fact drawn by the court below.[72] It can form an independent opinion and overrule the decision; otherwise, it should accept "the conclusions of fact of the tribunal of fact." Here, Lord Denning thought, the workman knew all there was to know and voluntarily decided to wear his own boots; even after the accident he continued to wear his own boots; it is fair to assume that "no advice beforehand would have had any effect." [73]

---

[69] [1959] A.C. 743, at 753.

[70] *Ibid.* at 757, 758. See Douglas Payne, " The Occupiers' Liability Act, 1957," 21 M.L.R. (1958), p. 359, and his references to *Easson* v. *L. N. E. Ry.* [1944] K.B. 421, 426, and *Morris* v. *Luton Corpn.* [1946] K.B. 114, 115. See also *Scott* v. *Musial* [1959] 2 Q.B. 429, 437, 442.

[71] [1959] A.C. 743, at 759; *cf. per* Lord Radcliffe in *Esso Petroleum Co., Ltd.* v. *Southport Corporation* [1956] A.C. 218, 241.

Yet, with great respect, was it not open to the House of Lords —on the principles laid down by Lord Denning—to come to the same conclusion on the application of those principles to the facts as Lord Cohen, in his very short, dissenting speech, *viz.*, that the employers were, in fact, negligent? [74]

EVIDENCE OF PRACTICE

Cavanagh v. *Ulster Weaving Co., Ltd.*[75] is a decision of importance upon several points that frequently arise in practice.

An inexperienced labourer, aged twenty and earning £4 15s. a week, fell from a crawling ladder while working on a factory roof and helping a man point ridge tiles. His work was to bring up cement in a bucket (weighing three stone when full) from the yard where it was mixed, by crossing from a plank gangway laid across the transverse ridges of the roof to a roof gutter below by means of the crawling ladder which was eleven feet long and lay flat against the slated aspect of the roof, opposite the glazed aspect of the roof which sloped thirty-seven degrees to the horizontal. There was no handrail to save him from this glass. He was wearing wet rubber boots—two sizes larger than they should have been—provided by the foreman, since water had collected in the gully. As a result of the fall, he was severely lacerated and his right arm had to be amputated three inches below the elbow.

The jury found for the plaintiff; they found that there had been negligence and contributory negligence and breach of the statutory duty under the Factories Act (Northern Ireland), 1938, to provide safe means of access. They awarded £6,520 damages, reduced to £5,868 having regard to his contributory negligence.

---

[72] Citing *Benmax* v. *Austin Motor Co., Ltd.* [1955] A.C. 370, 373, *per* Viscount Simonds.

[73] [1959] A.C. 743, at 762. See the arguments for the appellants at 746–749.

[74] *Ibid.* at 754. See [1958] 1 W.L.R. 225, at 230, *per* Lord Evershed M.R.; and at 233, *per* Lord Parker L.J.

[75] [1959] 3 W.L.R. 262.

The Court of Appeal (Lord MacDermott C.J. dissenting) allowed the appeal which was brought on the grounds that the damages were excessive, that the plaintiff had not specified what safeguards should have been provided nor alleged that the system was contrary to the general practice in the trade—*i.e.*, the case was not within the formula, propounded by Lord Dunedin in 1909 and widely followed since, that there must have been omission of a thing which either was " commonly done by other persons in the circumstances " or " was so obviously wanted that it would be folly in anyone to neglect to provide it." [76] Lastly, it was argued that there was no connection between the accident and the boots. The defendants had called a civil engineer with twenty years' experience of such work on roofs, who had said that the " set up " was " perfectly in accord with good practice."

The House of Lords allowed the appeal on the issue of negligence and restored the judgment in accordance with the jury's verdict.

The evidence of the expert, said Viscount Simonds, was " of very great weight," but not " so conclusive " as to require the case to be withdrawn from the jury. Although the figure of £6,500 was " appreciably higher " than a judge might award, said Lord Tucker, it was not " so extravagant " that a jury, properly directed, could not possibly have reached it.

Lord Keith added some observations on the " Dunedin formula " the precise and unambiguous words of which,[77] delivered in a case on a miner who had been injured due to a failure to provide some " shifting contrivance " as a protection against a piece of coal which fell between the cage and the side of the shaft, have for fifty years been frequently applied in English and Scottish cases.[78] Lord Keith sought to rationalise the formula—a process which the House of Lords is skilled in performing.

---

[76] *Morton* v. *Wm. Dixon, Ltd.*, 1909 S.C. 807, 809.

[77] *Ibid.* at 810: " It is out of the question to say that there is negligence on the part of the employers here because they did not put in a thing which nobody even asked them for, and which, if it exists at all, is certainly not a common thing."

> "Lord Dunedin," he said, "cannot, in my opinion, have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workman and in every case the question is whether the circumstances are such as to entitle judge or jury to say that there has or has not been a failure to exercise such reasonable care. It is immaterial, in my opinion, whether the alleged failure in duty is in respect of an act of commission or an act of omission." [79]

And Lord Somervell caustically observed:

> "The fewer the formulas, the better will be the administration in this branch of the law in which circumstances in one case can never be precisely similar to those in another." [80]

The "normal formula"—"reasonable care in all the circumstances"—should be applied "whatever the circumstances."

One other case is relevant in this context: *Morris* v. *West Hartlepool Steam Navigation Co., Ltd.*,[81] where the House of Lords, by a majority, held that shipowners, in not providing a guard rail round a hatchway, the 'tween deck hatch covers being left off, were in breach of their common law duty to a seaman. Lord Morton and Lord Porter, dissenting, relied upon the "Dunedin formula," but Lord Reid declared that Lord Dunedin's statement of the law "must now be read with Lord Normand's gloss" and on the facts here, "a reasonable man could have said that the precaution clearly ought to have been taken." [82] And Lord Cohen said that "the effect of their lordships' observations [*sc.*, in the *Paris* case] is that when the court finds a clearly established practice 'in like circumstances' the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one."[83]

---

[78] "The 'Dunedin formula' has been treated as firmly established in Scots law for generations": *per* Lord Cooper in *Gallagher* v. *Balfour Beatty & Co.*, 1951 S.C. 712, 716.

[79] *Cf. per* Lord Normand in *Paris* v. *Stepney B. C.* [1951] A.C. 367, 382: "the rule does not detract from the test of the conduct of the reasonable and prudent man. . . There is no magic in the word 'folly.'"

[80] [1959] 3 W.L.R. 262, at 273, 274.

[81] [1956] A.C. 552.

[82] *Ibid.* at 575.

Thus, by the well-known process of judicial reinterpretation, the Dunedin dictum and another formula have gone. "It is to be hoped," says the *Law Quarterly Review* in a recent editorial note, "that Lord Dunedin's unfortunate formula has now been buried forever and will not continue to haunt us from its grave."[84]

---

[83] *Ibid.* at 579.

[84] 76 L.Q.R. (1960), p. 6.

THE LAW OF DEFAMATION AND FREEDOM OF SPEECH

A. Goodman

It will be apparent that it is not possible within the scope of a short paper to cover more than a small corner of the vast area comprised within the title.

The purpose of this paper is to consider two aspects of the matter: first, whether the existing law of libel affords adequate protection against intrusions into personal privacy, that is to say, whether or not it is unfairly weighted in favour of newspapers and others likely to engage in such practices, and secondly, whether in certain important respects it is not unduly burdensome and onerous to publishers. The first consideration will occupy the greater part of this short survey.

The law of libel is to its everyday practitioner one of the most fascinating branches of our system of jurisprudence. The most jaded legal palate finds in it an excitement and a colour that may be notably lacking in other branches. The vindication of a reputation, the proof of a grave imputation, bring into the courts a drama alive with interest so long as human beings remain concerned with their neighbours' affairs. Moreover, the extent to which, in a free world, one man may say what he pleases of another must at all times be a concern of fundamental importance to legislators and citizens alike.

It will be remembered that in the classic chapter on "The Right to Freedom of Discussion," in Dicey's *Law of the Constitution*, the author corrects a widespread misconception:

> "Most persons form such loose notions as to English law that the idea prevails in England itself that the right to the free expression of opinion and especially that form of it which is known as 'the liberty of the press' are fundamental doctrines of the law of England, in the same sense in which they were

> part of the Ephemeral Constitution in 1791 and still are embodied in the articles of the existing Belgian Constitution. And further, that our courts recognise the right of every man to say and write what he pleases especially on social, political, or religious topics, without fear of legal penalties. Yet this notion, justified though it be, to a certain extent, by the habits of modern English life, is essentially false, and conceals from students the real attitude of English law towards what is called 'freedom of thought' and is more accurately described as the 'right to the free expression of opinion.' As every lawyer knows, the phrases 'freedom of discussion' or 'liberty of the press' are rarely found in any part of the Statute Book nor among the maxims of the common law. As terms of art they are indeed quite unknown to our courts. . . ."[1]

This statement of the English law, written in 1885, exactly represents the position today—except with regard to the Press. Despite the wide ambit of Press activities and the undoubted evidence that newspapers are arrogating to themselves an increasing licence in the ventilation of the private affairs of private persons, the tendency both of the courts and of legislation has been to extend the area of Press freedom to a point where it may perhaps be suggested that Dicey's statement no longer remains as precise and accurate a truth as it was in his own day. It is, of course, still the case that the freedom of expression and discussion in England is the freedom to say and publish that which is not prohibited by law. It is, in short, a negative and undefined right. It is the residual right remaining after the area of restriction has been shaded in on the chart. That being so, the ever-vital consideration of how free a man should be to say what he pleases becomes a question of balancing the relative rights of the Press and the public to publish and read, and of the private individual to be protected from an unwarranted violation of the sanctity of his home and habits. Whether or not, of recent days, the balance has not been adjusted in favour of the Press, the author and the publisher, is a matter which many practitioners in this field may have come to suspect. It is precisely this problem that I am seeking to present for your consideration, making it clear that after many years of practising in the field of libel, and advising both those who publish libels and those who complain of them, I still find the utmost difficulty in deciding precisely what middle course is most suitable, in a civilised society, to procure that no scandal can legitimately be concealed, no matter of public concern removed from public vigilance, while yet no inoffensive and law-abiding person can find himself pilloried and lampooned for the cruel delectation of a public either born or assiduously schooled to love sensation.

---

[1] (10th ed., 1959), p. 239.

THE SPECIAL PRIVILEGES OF NEWSPAPERS OR PUBLISHERS IN RELATION TO DEFAMATION

It has, for long past, been recognised that newspapers do enjoy a special position in that they must necessarily incur risks if they are faithfully to fulfil their duty of publishing the news of the day.

In 1843 Lord Campbell's Libel Act gave them a protection that has for practical purposes today ceased to have any real efficacy. Under the Act, if a libel is contained in a public newspaper or other periodical, it is open to the defendant to plead that it was inserted without malice and without gross negligence and that at the earliest opportunity the defendant caused to be published a full apology for the libel. By a subsequent amendment (Libel Act, 1845) the defendant must, in order to invoke the defence, make a payment into court by way of amends. For a purely technical reason the defence is no longer popular. If a payment into court is made under the Act, then even though the subsequent award of damages should be less than the amount paid into court, the defendant will nevertheless be liable for the costs of the action on the footing that there is an acknowledgment of the general liability. On the other hand, it is always open to a defendant to make a payment into court under the General Rules of Court without reference to the Act, but as an indication of his assessment of the maximum liability—and if a payment so made is not taken out (although the judge enjoys a general discretion in all questions of costs), it is the usual practice for the costs incurred since the date of the payment-in to be awarded to the defendant, if it transpires that the amount ultimately assessed by the judge or jury is less than the amount paid in. Accordingly, defendants in libel actions naturally prefer to operate under the general rules than under Lord Campbell's Act. It should be noted that Lord Campbell's Act does not constitute an exonerating defence but is merely a " plea in aid " of a mitigatory character.

The protection of defendants (not restricted to newspapers and publishers but obviously inuring principally to their benefit) has been extended in some measure, but by no means as effectively as its promoters envisaged, by section 4 of the Defamation Act, 1952.[1a] Under that section anyone who claims he publishes defamatory words innocently may escape liability for damages if, and only if, certain conditions are satisfied:

The publisher must prove:

1. (*a*) that he did not intend to publish the alleged defamatory words of and concerning the person making the complaint, and did not know of circumstances by virtue of which the words might be understood to refer to him; or
    (*b*) that the words were not defamatory on the face of them, and that he did not know of circumstances by virtue of which they might be understood to be defamatory of the complainant; and
2. In either event, that he exercised all reasonable care in relation to the publication.

The publisher must also prove that the words were written without malice. He may then make an offer of amends:

(*a*) to publish a suitable correction of the words complained of and a sufficient apology; and
(*b*) to notify persons to whom copies of the document have been distributed that the words are alleged to be defamatory.

[1a] The Act embodied some sensible intentions nullified by insufficient regard for practical considerations.

An offer of amends may or may not be accepted but, if the facts are established, constitutes an actual defence.

The utility of the defence has been much reduced by the stringent conditions contained in the Act which have undergone no relaxation through judicial interpretation. The offer must be made *as soon as practicable* after notice that the words were or might be defamatory of the plaintiff, and in one unreported case it was held that an interval of ten days was excessive and defeated the right to utilise the defence. Moreover, the offer must be accompanied by an affidavit specifying the facts relied on in order to show that the words were published innocently in relation to the party aggrieved. This last condition of itself operates to render the use of the defence of very limited application, since a defendant will naturally be reluctant to race into an admission of unqualified liability before he has had any real opportunity of investigating all the circumstances. Often, in an action for libel, the defendant's real dilemma is to determine whether or not a plea of justification should be entered. It must be recognised that the considerations which count in these matters are by no means restricted to the abstract question whether the defamatory statement is true. Many a true statement is incapable of proof, and it is recognised that an unsuccessful plea of justification involves risks in relation to damages so grave that only great newspaper organisations, men of principle and the impecunious will accept the risk. However, there are many defences short of justification, such as that the words are not defamatory at all, that they enjoy an absolute or qualified privilege, or that they constitute fair comment on a matter of public interest, which a defendant will want to consider before deciding to throw in his hand—and the prospect of canvassing all these possibilities and reaching a considered decision in less than ten days involves a flight of inexperienced fancy.

Such defences then require a careful marshalling of the facts and a consideration which would occupy a period of time too long to allow the Section 4 defence to be used. The section is therefore restricted in use to cases of obvious mistake, or a libel so patent that no real likelihood of argument exists. It is a credit to the ingenuity of those who practise in this particular field that libels of this latter category are few and far between.

Probably the most valuable right enjoyed by newspapers—although again the defence theoretically is not restricted to them—is that of Fair Comment, and it is in this field that, in the opinion of the author, judicial interpretation now leaves the legal position far too favourably inclined towards a newspaper defendant.

Again quoting Dicey, "Everyone has a right to publish fair and candid criticism." He cites Baron Huddleston: "A critic must confine himself to criticism, and not make it the veil for personal censure, nor allow himself to run into reckless and unfair attacks merely from the love of exercising his power of denunciation." These are impeccable sentiments but the latitude would seem to have been much enlarged by subsequent authority.

In the famous case of *Sutherland* v. *Stopes*[2] Hewart L.C.J. summed up in a fashion which departed materially from the letter and the spirit of Baron Huddleston's dictum:

> "What is it that fair comment means? It means this—and I prefer to put it in words which are not my own; I refer to the famous judgment of Lord Esher M.R. in *Merivale* v. *Carson*[3]: 'Every latitude,' said Lord Esher, 'must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say [not whether they agree with it, but] whether any fair man would have made such a comment. . . . Mere exaggeration, or even gross exaggeration, would not make the comment unfair. However wrong the opinion expressed may be in point of truth, or however prejudiced the writer, it may still be within the prescribed limit. The question which the jury must consider is this—would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said.' Again, as Bray J. said in *R.* v. *Russell*[4]: 'When you come to a question of fair comment you ought to

---

[2] [1925] A.C. 47.

[3] *Merivale* v. *Carson* (1888) 20 Q.B.D. 275, at 280, 281.

[4] Unreported, December 2, 1905, cited in Fraser's *Law of Libel* (7th ed., 1936), p. 108.

> be extremely liberal, and in a matter of this kind—a matter relating to the administration of the licensing laws—you ought to be extremely liberal, because it is a matter on which men's minds are moved, in which people who do know, entertain very, very strong opinions, and if they use strong language every allowance should be made in their favour. They must believe what they say, but the question whether they honestly believe it is a question for you to say. If they do believe it, and they are within anything like reasonable bounds, they come within the meaning of fair comment. If comments were made which would appear to you to have been exaggerated, it does not follow that they are not perfectly honest comments.' That is the kind of maxim which you may apply in considering whether that part of this matter which is comment is fair. Could a fair-minded man, holding a strong view, holding perhaps an obstinate view, holding perhaps a prejudiced view —could a fair-minded man have been capable of writing this?—which, you observe, is a totally different question from the question, Do you agree with what he has said? "

The view expressed in this passage now enjoys the authority of the House of Lords with a significant and important extension of the defence. In the case of *Turner* v. *M.G.M. Pictures, Ltd.*[5] the question of what criterion should be applied in determining whether a defence of qualified privilege was defeated by malice—*i.e.*, an issue for the present purpose indistinguishable in quality from the defence of Fair Comment—arose in circumstances of considerable interest to the literary world. The well-known film company Metro-Goldwyn-Mayer took strong objection to the undoubtedly trenchant film criticisms written by E. Arnot Robertson (Mrs. Turner), which they regarded as injurious to their business. Accordingly, an executive of that firm wrote to the British Broadcasting Corporation as follows:

> " We regret to inform you that, in our judgment, based upon a considerable number of talks given by Mrs. Arnot

---

[5] [1950] 1 All E.R. 449.

> Robertson, that critic is completely out of touch with the tastes and entertainment requirements of the picture-going millions who are also radio listeners, and her criticisms are on the whole unnecessarily harmful to the film industry. In these circumstances we propose not to invite Mrs. Arnot Robertson to review Metro-Goldwyn-Mayer films in future, and we would ask your kind co-operation in restraining her from doing so in B.B.C. broadcasts."

The critic sued the company for defamation and the House of Lords—affirming the decision of the Court of Appeal—in reversing the trial judgment in favour of the defendant, held that there was no malice which defeated the qualified privilege of the defendant. The importance of that case was that in adopting Lord Esher's observations, quoted by Hewart L.C.J. in the passage set out above, Lord Porter substituted the word "honest" for "fair" as the test to be applied in determining the state of mind of the defendant in uttering the libel. In short, as the law now stands, if an opinion is honestly expressed, it is afforded the complete protection of the defence of Fair Comment.

Construed literally, the effect of this interpretation is that, however unfair or stupid or misguided or ignorant a comment may be, if it is honestly held, the victim can have no redress.

Encouraged by the legal protection extended to them, there is no doubt that a school of criticism has developed which has shed the canons of reasonable restraint and indulges in insult and invective as a journalistic technique.

It is, of course, unthinkable that at this moment of time anyone should contemplate a curtailment of the legitimate rights of the critic and the writer to express an honest view forcibly and fearlessly. On the other hand, to adopt the criterion of "honesty" as the test of legal immunity is unreasonable and does not take into account the realities of the situation. It is one thing to endure the honest, if idiotic, views of a private individual. The quality of those views can be assessed by the people who know him, who can determine for themselves whether he is a responsible individual or the extent of his derangement. It is quite another thing to be subjected to the honest views of some perverse and impudent scribe who (if only temporarily) writes with the full authority of an important newspaper or journal. The reader will invest those views with a special significance because of the position occupied by the writer, and the unhappy victim will have no opportunity of demonstrating to the world at large that the man who has attacked him may really be devoid of critical judgment, uninformed and violently prejudiced. It is true that Lord Porter's judgment leaves open exceptional cases where the language employed is so flagrant that the words could be regarded *per se* as incapable of being honestly employed by any sentient human being. But this is a dubious protection. It is to be hoped that, one day, the position may be restored and that the test of a Fair Comment is that it should be "Fair" by the standards of reasonable human beings.

The need for such a change is, it is believed, illustrated by the extent to which defendant newspapers are prepared to go in seeking to invoke the defence of Fair Comment. The recent *Liberace* case was as good an illustration as could be found. In that case Mr. Liberace—an American gentleman who uses a piano as a feature of his entertainment—was regarded, by the austere standards of the defendant newspaper, as being somewhat vulgar and exhibitionist in his methods. The language employed to express its views might have been regarded as immoderate if applied to one of the world's historic criminals; nevertheless, the newspaper conducted a most spirited defence designed to establish that the words were Fair Comment, and the judge in a summing up of the greatest care and accuracy, inevitably directed that the jury should be guided by Lord Porter's test. In the event a substantial award of damages was given, but it is extremely unlikely, if the change sought for in this paper were to be introduced, that a defence of this character could be pleaded with any reasonable prospect of success in respect of abuse as flagrant and violent as the words which were the subject of that case.[6]

---

[6] *Liberace* v. *Daily Mirror Newspapers, Ltd.*, *The Times*, June 9, 11, 12, 16, 17 and 18, 1959.

INTERLOCUTORY INJUNCTION

A further important protection, of special value to newspapers, is the almost insurmountable difficulty in obtaining interlocutory relief in libel proceedings.

Ordinarily the court will not grant an interlocutory injunction unless there is proof of irreparable damage.[7] However, even proof of immediate injury and irreparable damage is not of itself enough to obtain an injunction in the special cases of libel or slander. The court must, in effect, be satisfied first that there is no possibility of privilege, unless there is clear evidence of malice, and secondly that there is no possibility of a successful defence of justification—if the defendant indicates his intention to raise this defence.

In *Clement & Johnson* v. *Associated Newspapers*[8] Bankes L.J. put the burden very high, and it is respectfully suggested too high when he said: " when once a defendant says he is going to justify the words complained of there is an end of the case so far as an interim injunction is concerned."

In fact, interim injunctions have been granted where the court is satisfied that no jury is likely to find the words other than libellous or " where, if the jury did not so find, the court would set aside the verdict as unreasonable."

The burden that has to be discharged by a plaintiff in quest of such an injunction is, however, a very heavy one and it is generally accepted that applications are unlikely to succeed except in cases of unarguable flagrancy. It may be of interest to note that, although libel is a matter almost invariably dealt with in the Queen's Bench Division, there is a recognised right to apply for an injunction in the Chancery Division since, by so doing, the application will be made in open court, with attendant publicity, in place of the Queen's Bench Division where it is made in chambers and where. unless otherwise directed by the judge, it would constitute a contempt of court to publish details. Once the application for interim relief has been made in the Chancery Division the practice would be to apply for a transfer to the Queen's Bench Division for ensuing stages of the action.

---

[7] *Alastair Sim* v. *H. J. Heinz & Co., Ltd.* [1959] 1 All E.R. 541.

[8] *The Times*, July 30, 1924.

Having considered the special protection extended to newspapers, it is for momentary reflection whether there should be some curtailment of these rights, and some additional right to protect the privacy of the individual.

As long ago as 1890 it was said in an article in the *Harvard Law Review*:

> "The Press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery. To satisfy a prurient taste the details of sexual relations are spread broadcast in the columns of the daily papers. To occupy the indolent, column upon column is filled with idle gossip, which can only be procured by intrusion upon the domestic circle. The intensity and complexity of life, attendant upon advancing civilisation, have rendered necessary some retreat from the world, and man, under the refining influence of culture, has become more sensitive to publicity, so that solitude and privacy have become more essential to the individual." [9]

These words probably remain as true today as ever before, and—it is a sad reflection—apply with equal force in this country as elsewhere.

The *Harvard Law Review* article was designed as a plea for the creation of a right of privacy which to some extent—although a limited one—has now been established in some of the states of the United States of America.

It is the view of the present writer that the creation of such a right is not on balance desirable in this country. The problems involved in defining its extent and application are vast. On the whole, victims of excessive newspaper publicity are people who court it and could avoid it if they so desired. The rare cases of a genuine hardship are insufficient to vindicate a complete and drastic change in the law of defamation or in creating entirely new rights outside the field of defamation.[10]

---

[9] S. D. Warren and L. D. Brandeis, "The Right to Privacy," 4 Harv.L.R. (1890–91), p. 193, at p. 196.

It will be remembered that the existence of criminal libel itself provides an effective weapon against the publication of prurient details, even if true, about private persons. For a defence of justification to succeed against a charge of criminal libel it is necessary to prove not only that the words are true but that they are published for the public benefit. The defendant must specify the facts on which he relies to show that the publication of the matter charged was for the public benefit. A criminal defamation must be of the written word and there is no similar offence in relation to slander, but there is another important distinction from civil defamation in that since the essence of the crime is that it is calculated to cause a breach of the peace, publication to the prosecutor is sufficient and there need not be any publication to a third person. Prosecutions for criminal libel have probably never entirely recovered from the famous prosecution of Pemberton Billing in 1918.[11] This gentleman—a famous eccentric—was an Independent Member of Parliament for Mid-Hertfordshire, and demonstrated his independence by never wearing a tie. In a review published in a paper conducted by him of Oscar Wilde's *Salome* in which the distinguished actress, Miss Maud Allen, appeared, he utilised an obscene headline and made reference to an alleged black book which was supposed to contain the names of 47,000 prominent British citizens whose sexual vices were known to the Germans—then at war with us—and to whom these citizens would therefore be in bondage. Miss Maud Allen complained of the review and the case is now regarded as an almost classic instance of mismanagement by Darling J., who was under the grave disadvantage of finding himself included amongst the 47,000 persons whose names featured in the book. Incredible as it may seem, the case concluded with an acquittal by the jury.

When reflecting complacently on the mass hypnosis induced by

---

[10] A similar view is expressed by Professor Dennis Lloyd in his article, "The Reform of the Law of Libel," 5 *Current Legal Problems* (1952), p. 168.

[11] *Cf*. accounts of the trial in E. Graham, *Lord Darling and his Famous Trials* (1929); D. Barker, *Lord Darling's Famous Cases* (1936); and especially D. Walker Smith, *Life of Lord Darling* (1938), p. 204 *et seq*.

Senator McCarthy in the United States, it is salutary to remember the case of Pemberton Billing.

In one more instance, it is believed that the law of libel can on occasion do a grave disservice to "freedom of speech" in its widest sense.

The real vice of the present law of libel is not that it restricts newspapers and other vast and prosperous organisations from the dissemination of their views, but that it operates as a terrifying Sword of Damocles over the heads of the small publisher to whom the possibility of a verdict of substantial damages is a constant danger and threat.

The ironic situation exists, therefore, that while the law of libel is no real deterrent to a great newspaper—although it no doubt has a healthy moral effect—it so operates *in terrorem* elsewhere as frequently to prevent the publication of honest views where even a remote and slender danger exists that the words may be defamatory, since it can be just as injurious and damaging to a defendant to fight and win a libel action—against a penniless plaintiff—as to lose one. This risk is now increased by the magnitude of the damages which are frequently awarded by juries today. It is important to say that the writer does not refer to any particular case, since there have obviously been cases where the behaviour of the defendant can only be properly dealt with by a very substantial award of damages. On the other hand, the exercise of reasonableness in such awards is of the greatest importance not merely in relation to the parties themselves but from the public viewpoint lest honest views be suppressed because the penalties attaching to an error of judgment are too grave to be contemplated by any publisher of modest resources.

EMERGENCY LEGISLATION IN THE COMMONWEALTH

DENYS C. HOLLAND

ALTHOUGH a few major emergencies in Commonwealth countries, for example, those in Cyprus, Kenya and Nyasaland have received considerable publicity in the world Press, it would perhaps surprise many people to learn that since 1946 states of emergency have been proclaimed on no less than twenty-nine separate occasions in British dependent territories. These emergencies, in general, have been proclaimed either under the Emergency Laws Orders in Council, 1939 and 1956, or under local emergency legislation of a temporary or permanent character, and the territories involved range alphabetically from Aden to Zanzibar.[1] In addition, emergency situations have arisen within the territories of some of the independent members of the Commonwealth but these are not the main concern of this paper since this country has no control over or responsibility for them.

The most recent major emergency situation in a British dependency has been that in Nyasaland. This paper will primarily deal with this first in order to illustrate the types of emergency powers which are available in dependent territories. Secondly, there are, in addition, territories in which a state of semi-emergency exists, that is to say, in which, whilst no formal state of emergency exists, there are special powers to deal with a situation midway between an emergency and normal conditions. Such is the situation in Northern Rhodesia and in Kenya. These midway powers will be dealt with next. Thirdly, many of the problems which arise in an emergency can be, and are, dealt with under the ordinary law of the colonial territory concerned, *e.g.*, the banning of societies, and these provisions too must be considered in any examination of emergency legislation in dependent territories.

---

[1] Aden (3/12/47–2/2/48 and (Colony only) 2/5/58–); Barbados (22/9/55–18/12/55); British Guiana (8/10/53–23/11/57); Cyprus (26/11/55–); Gold Coast (3/3/48–14/10/48 and 12/1/50–18/3/50); Grenada (20/2/51–6/3/51 and 26/9/55–28/6/56); Hongkong (October 1956); Jamaica (18/2/46–15/3/46); Kenya (20/10/52–); Malaya (Federation) (12/7/48–); Malta (30/4/58–15/4/59); Nigeria (26/11/49–8/12/49); Nigeria (parts of Eastern Region only) (5/2/58–March 1958); Nigeria (Northern Region only) (18/5/53–13/7/58); Northern Rhodesia (Western Province only) (11/9/56–31/12/56); Northern Rhodesia (Railway system only) (30/9/58–); Nyasaland (2/3/59–); Sarawak (First Division only) (8/8/52–16/1/53); Singapore (22/7/48-October 1955); Tanganyika (in Northern and Lake Provinces only) (18/5/54–): Trinidad (18/1/47–12/2/47 and 11/3/48–6/7/48); Uganda (28/4/49–13/10/49); Uganda (Buganda Province only) (30/11/53–31/3/54 and 31/5/54–10/1/55); Zanzibar (6/9/48–23/9/48).

EMERGENCY LEGISLATION

The principal legislation, although not the only legislation, authorising the proclamation of an emergency in British dependent territories consists in the Emergency Powers Orders in Council of 1939 [2] and 1956.[3] It was under the 1939 Order in Council that the emergency in Kenya was proclaimed and it was under the 1939 Order, as amended by the 1956 Order, that the emergency in Nyasaland was proclaimed. Section 3 of the 1939 Order provided:

> " The provisions of Part II of this Order shall have effect in any territory in which they shall from time to time, in case of any public emergency, be brought into operation by proclamation made by the Governor, and shall continue in operation until a further proclamation directing that they shall cease to have effect is made by the Governor, and shall then cease to have effect except as respects things previously done or omitted to be done."

The 1956 Order in Council substitutes therefor a new section 3 which reads:

> " (1) If the Governor is satisfied that a public emergency exists he may by proclamation declare that the provisions of Part II of this Order shall come into operation accordingly; and they shall continue in operation until the Governor by a further proclamation directs that they shall cease to have effect except as respects things previously done or omitted to be done;

---

[2] G.N. 56 of 1939.

[3] S.I. 1956, No. 731.

> "(2) A Proclamation under subsection (1) of this section may, if the Governor thinks fit, be made so as to apply only to such part of the territory as may be specified in the Proclamation (in this subsection called 'the emergency area') in which case Regulations made under the said Part II shall, except as otherwise expressly provided in such Regulations, have effect only in the emergency area: provided that for the avoidance of doubt it is hereby declared that the expression 'the territory' in the said Part II shall not be construed as referring only to the emergency area."

The differences between the repealed section 3 and the new section 3 would seem to be that, first, the new section 3 expressly gives the Governor a discretion to determine whether an emergency exists, and, secondly, the new section 3 expressly empowers the Governor to proclaim an emergency in part only of a territory.

Part II of the 1939 and 1956 Orders in Council provides in section 6:

> "(1) The Governor may make such Regulations as appear to him to be necessary or expedient for securing the public safety, the defence of the territory, the maintenance of public order and the suppression of mutiny, rebellion and riot, and for maintaining supplies and services essential to the life of the community.
>
> "(2) Without prejudice to the generality of the powers conferred by the preceding subsection, the Regulations may, so far as appears to the Governor to be necessary or expedient for any of the purposes mentioned in that subsection:
>
> (*a*) make provision for the detention of persons and the deportation and exclusion of persons from the territory;
>
> (*b*) authorise—
>
> (i) the taking of possession or control, on behalf of His Majesty of any property or undertaking;
>
> (ii) the acquisition on behalf of His Majesty of any property other than land;
>
> (*c*) authorise the entering and search of any premises;

(*d*) provide for amending any law, for suspending the operation of any law and for applying any law with or without modification;

(*e*) provide for charging in respect of the grant or issue of any licence, permit, certificate or other document for the purposes of the Regulations, such fee as may be prescribed by or under the Regulations;

(*f*) provide for the payment of compensation and remuneration to persons affected by the Regulations;

(*g*) provide for the apprehension, trial and punishment of persons offending against the Regulations: provided that nothing in this section shall authorise the making of provision for the trial of persons by Military Courts."

The above Emergency Powers Orders in Council, it will be observed, are much more drastic in their effect in the colonies than is the Emergency Powers Act, 1920, in the United Kingdom—in particular, in imposing none of the restrictions on the executive imposed by the latter law. Local Ordinances corresponding to the Emergency Powers Act, 1920, do exist in some colonial territories, but they are clearly not nearly so important as the Emergency Powers Orders in Council of 1939 and 1956, and it is not intended to dwell on them in this paper beyond giving the following example. A typical example of such a local provision is the Emergency Regulations Ordinance, 1948, of Nyasaland[4] which provides in its section 2 that the Governor in Council may proclaim the existence of a state of emergency whenever action has been taken, or is threatened, which is calculated to interfere with the essentials of life or the means of locomotion. Such a proclamation, like the equivalent proclamation under the Emergency Powers Act, 1920, continues in force for only one month unless renewed.[5] Whilst the proclamation is in force, the Governor in Council may " make any Regulations whatsoever which he considers desirable in the public interest,"[6] with the proviso that " no such Regulations shall alter any existing procedure in criminal cases or confer any right to punish by fine or imprisonment without trial." The Ordinance provides that, in particular, Regulations may be made with respect to, *inter alia*, "censorship and the control and suppression of publications, writings, maps, plans, photographs, communications, and means of communication," "arrest, detention, exclusion and deportation," "appropriation, control, forfeiture and disposition of land or other property and the use thereof" and "requiring persons to work or render services." Presumably the provision referring to detention would authorise the making of a Regulation providing for preventive detention despite the prohibition on any Regulation authorising punishment without trial.[7] Unless other provision is made by the Regulations, the penalty for infringing Regulations made under the Ordinance is imprisonment for a term not exceeding twelve months or a fine not exceeding £200 or both.[8]

---

[4] No. 35 of 1948 and No. 42 of 1953.

[5] *Ibid.* s. 2 (2).

[6] *Ibid.* s. 3 (1).

Let us return now to the much more important powers conferred by the Emergency Powers Orders in Council of 1939 and 1956 and consider the types of Emergency Regulations which may be made thereunder. An example of the use of such a power and the making of such Regulations is provided by the situation in Nyasaland.

On March 2, 1959, the Governor of Nyasaland proclaimed a state of public emergency within the Nyasaland Protectorate,[9] whereupon Part II of the Emergency Powers Orders in Council came into operation within that territory and the Emergency Regulations, 1959,[10] were made thereunder. It is not intended here to consider in any detail the causes of the emergency or the justification therefor, since this may be said to be primarily a political question which has been fully investigated by the Devlin Commission of Inquiry.[11] The Regulations made under the Nyasaland Emergency

---

[7] *Cf. R.* v. *Halliday, ex p. Zadig* [1917] A.C. 260.

[8] *Loc. cit.*, in note 4, above, s. 6.

[9] Government Notice No. 30, published in the *Nyasaland Gazette Supplement*, dated March 3, 1959.

[10] Government Notice No. 31, published in the *Nyasaland Gazette Supplement*, dated March 3, 1959.

[11] *Report of Nyasaland Commission of Inquiry*, Cmnd. 814 (1959), hereinafter cited as the Devlin Report.

Proclamation are considered in order to assess what kind of powers can be and are taken by the administration in a dependent territory under the Emergency Powers Orders in Council.

The Emergency Regulations, 1959, of Nyasaland provide a comprehensive code giving the administrative authorities extensive powers over persons and property within the Protectorate. Perhaps the main Regulation is Regulation 24, which authorises detention without trial. Under this Regulation the Governor may make a detention order whenever he is satisfied that it is necessary for the purpose of maintaining public order. There is no time limit imposed for such detention, but the Governor is required to review the order at six-monthly intervals in order to consider whether it should be revoked, varied or suspended, "having regard to all the circumstances of the case." In addition, the Governor may revoke or vary the order or suspend it subject to such conditions as to residence, employment, associations with other persons or other similar matters at any time, as he thinks fit. Furthermore, a person detained has a right to make representations in writing both to the Governor and to an Advisory Committee.

The Advisory Committee is to consist of persons nominated by the Governor, the Chairman being a person who holds or has held judicial office, and is to meet *in camera*; it is the duty of the Chairman of the Committee to advise the detainee of the grounds of the detention order made against him. The safeguards thus provided for the detainee correspond closely to those provided by Defence Regulation 18B in the United Kingdom during the last war. Although Regulation 52 authorises the Governor to delegate any of the powers conferred on him by the Regulations it appears that this power of detention is not delegated and such detention orders are therefore described in the Devlin Report as "Governor's Orders."[12]

However, the same Regulation 24 provides that any authorised officer may make a twenty-eight day order, that is to say, an order authorising detention for twenty-eight days, if he has reason to believe that there are grounds for detention under this Regulation. The Devlin Report points out that the Regulation does not say whether or not this sort of order is renewable by the authorised officer, but that nevertheless " in some cases the period of twenty-eight days has been repeated." [13]

---

[12] For the legality of the delegation of the power of detention, see *Mungoni* v. *Att.-Gen. of Northern Rhodesia* (*The Times*, January 26, 1960), concerning similar regulations in Northern Rhodesia.

A further power of detention is given by Regulation 26, which provides that if a person, upon being questioned by an authorised officer or a member of Her Majesty's forces, fails to satisfy the questioner as to his identity or as to the purpose for which he is in the place where he is found, and the questioner reasonably suspects that that person has acted in a manner prejudicial to the public safety or the preservation of the peace or is about to commit an offence against the Regulations, he may detain him pending inquiries. The period of detention under this Regulation may vary from twenty-four hours to seven days according to the status of the person making the arrest.

In their Report, the Devlin Commission state that they understand that by the middle of May 1959 about 1,000 persons had been and were detained, most of them on twenty-eight day orders on suspicion of subversive behaviour.[14] In this connection the Commission give evidence in support of their much-publicised statement that Nyasaland was at that time a police state. They point out that, from a number of African witnesses who were nervous of giving evidence before them, they gained the impression that it was unsafe for anyone in Nyasaland to criticise the policy of the Government except in the most restrained manner.[15]

The Devlin Report points out that the Regulations make no provision as to the manner of making arrests for the purposes of preventive detention.[16] However, the Commission understand the view of the Government to be that the person making such an arrest is subject to the same obligations and has the same powers as if he were arresting for a crime. In this connection the Commission call attention to the fact that section 17 of the Criminal Procedure Code provides that the person arrested shall not be subjected to more force than is necessary to prevent his escape and that they had been told that the ordinary practice in Nyasaland is to use handcuffs on arrest. In fact, it would appear from the Report that in several cases more force has been used than might have seemed strictly necessary in the circumstances. In some cases, the person arrested was refused any reason for his arrest by those effecting it; the evidence of one special constable before the Commission concerning an arrest states: "We were sent out to arrest him and that was our job; we did not have to tell him anything about why."[17] The Commission conclude: "We think that it is quite evident that unnecessary and illegal force was used in making a number of these arrests."[18]

---

[13] Cmnd. 814 (1959), p. 91.

[14] *Ibid.* p. 130.

[15] *Ibid.*

[16] *Ibid.* p. 92.

In addition to the powers of preventive detention given by Regulations 24 and 26, the Emergency Regulations in Nyasaland also confer wide discretionary powers of search which have frequently been used as a preliminary to both preventive detention and arrest for a crime against the ordinary law. The main regulation is Regulation 46, which provides:

> "Any authorised officer, police officer or member of Her Majesty's Forces or any person acting under the direction of such officer or member of Her Majesty's Forces may . . . if he suspects that any evidence of the commission of an offence against these Regulations or against the provisions of the Penal Code or any other law is likely to be found . . . (*a*) enter and search any premises; (*b*) search any vessel, aircraft, train, vehicle or individual whether in a public place or not, and may seize anything found therein or on such individual as the case may be."

This Regulation has been used extensively to round up members of the Nyasaland National Congress which, on March 3, 1959, became an unlawful society under section 70 of the Penal Code, and the membership of which therefore became an offence against the ordinary law as from that date—an example of the combined use of powers given both by the ordinary law and by emergency law to deal with an emergency situation. Section 70 provides that a society is an unlawful society if it is declared by order of the Governor in Council to be a society dangerous to the good government of the Protectorate or the Federation—a usual provision in the Penal Codes of dependent territories.

---

[17] *Ibid.* p. 95; *cf. Christie* v. *Leachinsky* [1947] A.C. 573.

[18] Cmnd. 814 (1959), p. 126.

In this connection, the Devlin Report points out that a rather surprising use seems to have been made of section 73 (3) of the Penal Code.[19] That section provides that when any document relating to an unlawful society is found in the possession or under the control of any person, it shall be presumed, until the contrary is proved, that such person is a member of that unlawful society. As the Report says, one might have thought that a document would not be regarded as relating to an unlawful society for the purposes of section 73 (3) unless at the time of its issue the society was unlawful. This view was not, however, taken by the courts of Nyasaland, possession of a document having been taken as virtually conclusive proof in a number of cases that the holder intended to continue his membership of Congress after it became unlawful on March 3, 1959.[20]

In addition to being used for purposes of effecting preventive detention under Regulation 24 and arrest for an offence under the Penal Code, Regulation 46 has also been used in conjunction with Regulation 26 and 11 for the purpose, according to the Devlin Commission, of imposing a form of collective punishment upon troublesome villages.[21] Regulation 26 has already been referred to. Regulation 11 provides:

> "(1) If, as respects any area, it appears to the Governor or a Provincial Commissioner to be necessary or expedient that special precautions should be taken to prevent malicious injury to persons or property, he may by order declare such area to be a special area for the purpose of these Regulations.
>
> (2) It shall be the duty of any person in a special area to stop and to submit to search by a competent authority when

---

[19] *Ibid.*, p. 130.

[20] *Ibid.* Similarly in the case of Jomo Kenyatta in Kenya, evidence connecting the accused with Mau Mau before it became an unlawful society was admitted in evidence; see 7 *Current Legal Problems* (1954), pp. 183–187.

[21] Cmnd. 814 (1959), pp. 136–137.

> called upon so to do, and if any person fails to stop when challenged or called upon to stop by a competent authority he shall be guilty of an offence and may be arrested by any competent authority without warrant.
>
> (3) It shall be lawful for any competent authority in order (*a*) to effect an arrest under sub-regulation (2); or (*b*) to overcome forcible resistance offered by any person to such arrest; or (*c*) to prevent the escape from arrest or the rescue of any person arrested as aforesaid, to use such force as, in the circumstances of the case, may be reasonably necessary, which force may extend to the use of lethal weapons."

On March 9, 1959, special areas were declared under this Regulation, ostensibly for the purpose of dealing with the problem created by the erection of road blocks. The Devlin Commission point out that it is only too easy for persons to emerge from hiding at the sides of roads for the purpose of re-erecting dismantled road blocks and run away at the approach of security forces. " Under the ordinary law," the Report of the Commission states, " force can be used to restrain a person once he has been arrested; this Regulation makes it clear that force, including lethal force, can be used in order to effect the arrest." [22] It is difficult to understand the implication that under the ordinary law force could not be used to effect an arrest but only to prevent the escape of a person already arrested. Section 18 of the Penal Code of Nyasaland [23] specifically provides that " where any person is charged with a criminal offence arising out of the lawful arrest, or attempted arrest by him of a person who forcibly resists such arrest or *attempts to evade being arrested* the court shall, in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person." Furthermore, section 14 of the Criminal Procedure Code of Nyasaland [24] provides that if a person

---

[22] *Ibid.*, pp. 131–132.
[23] Cap. 23, Vol. I of the Laws of Nyasaland, 1957.
[24] *Ibid.* cap. 24.

"forcibly resists the endeavour to arrest him, or *endeavours to evade the arrest*, such police officer or other person may use all means necessary to effect the arrest: Provided that nothing in this section shall be deemed to justify the use of a greater force than was reasonable in the particular circumstances in which it was employed or was necessary *for the apprehension of the offender*." These provisions would appear to give ample power to use force to effect an arrest without the invoking of Emergency Regulation 11 for the purpose. In addition, Emergency Regulation 15 empowers any member of Her Majesty's forces or any police officer to require any person to remove any barricade from a road, and Emergency Regulation 40 empowers any person upon whom powers are conferred by those Regulations to use all force reasonably necessary for the exercise of the power.

It is not surprising, therefore, to find that Regulation 11 has in fact not been used for the purpose of dealing with trouble at road blocks, for which purpose it appears to have been unnecessary, but has been used instead, according to the Devlin Commission, for the purpose of cordoning and searching villages.[25] An area would be declared a special area under Regulation 11, a search would take place under Regulation 46, and persons would then be detained pending inquiries under Regulation 26.[26] The ostensible purpose would be to search for wanted men and evidence against them, but, as already pointed out, the Devlin Commission regard it as hardly more than incidental to the main purpose of the operation, the imposition of a form of collective punishment upon troublesome villages. The Report states: "They were punitive expeditions intended to make it plain that siding with Congress led to very unpleasant consequences." [27]

Whilst Regulations 11, 26 and 46 have apparently been used for the purpose of collective punishment, although not intended for that purpose, the Regulation specifically authorising collective punishment has strangely enough, according to the Devlin Commission, not been used generally for that purpose, but for the purpose

[25] Cmnd. 814 (1959), p. 132.

[26] *Ibid.*

[27] *Ibid.* p. 137.

only of obtaining compensation for damage done.[28] The relevant Regulation is Regulation 67,[29] which provides:

> " Where it appears to a District Commissioner with respect to any area comprised within his District that (*a*) a crime has been committed and the inhabitants have failed to take reasonable steps to prevent the commission of the offence or to prevent the escape of the offender, or (*b*) the inhabitants, or a substantial number of them, are members of, or are or have recently been active in the furtherance of the objects of an unlawful society, or have recently consorted with or harboured any members of any such society, the District Commissioner may, with the approval of the Provincial Commissioner, impose fines on all or any of the inhabitants of the area."

As the Devlin Commission point out,[30] this Regulation confers a discretion on the District Commissioner which is wide enough to enable him to impose a fine practically wherever he wants in view of the widespread membership of Congress at the time, and in view of the fact that the Regulation only requires it to appear to the District Commissioner that a substantial number of the inhabitants are members of that organisation. Furthermore, there is no limit to the amount of the fine which may be imposed under the Regulation. The Devlin Commission conclude that, in fact, the power has rarely been abused. Nevertheless, the fines collected in Nyasaland amounted to a little over £30,000, individual contributions varying from five shillings to thirty shillings. When it is borne in mind that thirty shillings represent the average monthly wage for an African in Nyasaland and that the same sum is also the amount of the annual poll tax, it will be appreciated that the collective fine might be a not inconsiderable burden on one who might in fact be innocent.

The method of enforcing payment of the collective fines also appears to have been questionable. The Regulation provides for enforcement of payment by imprisonment following conviction in a subordinate court or by seizure of property by order of the District

---

[28] *Ibid.* p. 138.

[29] Added by the Emergency (Amendment No. 6) Regulations.

[30] Cmnd. 814 (1959), p. 138.

Commissioner. The Devlin Report states [31] that, in fact, payment seems to have been secured in some instances by a threat of reprisals in the event of non-payment. One instance is cited in which the notification of fine stated: "Between April 6 and April 9 security forces will operate throughout the area in order to apply the necessary pressure on all people to pay."

In addition to the possibility of imposing a collective fine under Regulation 67 in order to compensate for damage done in any area, the District Commissioner previously also had power under Regulation 67A [32] to order the inhabitants to make good by their own work the damage done and this could be ordered in addition to, or in lieu of, a collective fine. Regulation 67A was revoked on May 7, 1959,[33] but there still remains in force Regulation 20, which empowers the Governor, or any person authorised by him, to direct any person to undertake and perform, for such remuneration as may be specified, any work or duties whatsoever, wherever it appears to him to be expedient for securing or providing for the continuance of essential services, or for the purpose of maintaining public security or public order. As with collective fines, so here too enforcement appears to have been by extra-legal means. Both Regulations 67A and 70 state that disobedience to an order thereunder shall be an offence, but enforcement appears to have been occasionally achieved by threat of immediate unpleasant consequences. The Devlin Report quotes from the evidence of a District Commissioner: "I gave them a finishing date for the work and said that the King's African Rifles would remain until it was done and if it was not done quickly they would become unpleasant and impatient." [34]

The searches which took place under Regulation 46 frequently led to the confiscation of implements without any arrangement being made for their return or the payment of compensation. As the Devlin Report points out,[35] for a man with an annual income of £20, £3 of which may have gone in poll tax and contribution to damage caused by others, the loss of an implement such as an axe or chopper might be a serious matter. The Emergency Regulations which, the Nyasaland Government contended, authorised the seizure of implements were Regulations 40 and 46.

---

[31] *Ibid.* p. 139.

[32] Added by the Emergency (Amendment No. 6) Regulations.

[33] By the Emergency (Amendment No. 10) Regulations.

[34] Cmnd. 814 (1959), p. 140.

[35] *Ibid.*

Regulation 40 provides:

> "Any person who carries or has in his possession or under his control any dangerous weapon, in circumstances which raise a reasonable presumption that he has used or intends or is about to use such dangerous weapon for any unlawful purpose, shall be guilty of an offence."

"Dangerous weapon" is defined in Regulation 2 to include "a sword, spear, knife, cutlass, axe, hatchet, knobkerrie or stick and any article made or adapted or suitable for causing injury to the person or intended by the person having it for such use." The argument of the Nyasaland Government was that the presumption of an "unlawful purpose" for the purpose of Regulation 40 would arise in a riot area and that this meant that any person carrying an agricultural implement such as an axe could be arrested, and, as an incidental consequence, the implement could be seized.[36] Since no specific reference to seizure and confiscation is made in this Regulation, this argument appears of doubtful validity even if the presumption as to unlawful purpose is accepted. More valid appears to have been the argument that seizure of implements was authorised by Regulation 46. This Regulation, as mentioned before, provides that where premises are searched under that Regulation, the officer entering and searching "may seize anything found therein." This Regulation appears to impose no limitation as to the nature of the thing seized or the grounds of seizure; once entry and search are validly effected under the Regulation, it appears that anything can be seized. Whether this interpretation of the Regulation would be accepted by the courts has, however, not been decided and, if such interpretation be accepted, the legality of the Regulation itself must be in doubt in view of the presumption applied in English courts against the taking of property without compensation.[37]

---

[36] *Ibid.*

[37] *Cf. per* Lord Atkinson in *Central Control Board (Liquor Traffic)* v. *Cannon Brewery Co., Ltd.* [1919] A.C. 744, at 752.

The Regulations considered above, although they comprise only a small part of the whole, appear to be the Regulations which were primarily used by the authorities to cope with the emergency declared in Nyasaland, and appear also to be those which are most controversial in the discretions and wide powers which they confer. Other Regulations confer powers to control meetings, processions, publications and other similar matters which, whilst not being unimportant, appear largely to duplicate powers given by ordinary laws (which will be considered later in this paper) and appear not to have caused any great controversy. Obviously in an emergency situation (assuming the emergency to be justified) discretionary powers must be given to the executive; "a war cannot be fought on the principles of Magna Carta."[38] Whether the discretions given by any of the Nyasaland Emergency Regulations are wider than is necessary for the purpose must be a matter of opinion, but in view of the evidence of abuse provided by the Devlin Report it would seem indisputable that some of the discretions conferred are in any event dangerously wide.

SEMI-EMERGENCY LEGISLATION

In some dependent territories there are powers to make Regulations under a local Emergency Powers Ordinance in circumstances where, although an emergency is not yet in existence, it is feared that such a situation may develop if action is not taken to prevent it. An example of such a provision is the Emergency Powers Ordinance of Northern Rhodesia,[39] which provides in section 2 (1):

> "If at any time it appears to the Governor that any action has been taken or is immediately threatened by any person or body of persons of such a nature and on so extensive a scale as to be likely to endanger the public safety or to deprive the community or any substantial portion of the community of any of the essentials of life, the Governor may by Proclamation in the *Gazette* declare that a state of emergency exists in the Territory or any portion thereof."

---

[38] *Cf. Liversidge* v. *Anderson* [1942] A.C. 206.

[39] Cap. 29 of the Laws of Northern Rhodesia, Vol. II.

It is further provided in section 4A (1)[40]:

> "if at any time the Governor is satisfied that any action has been taken or is immediately threatened by any person or body and that such action though not of itself of such a nature and on such an extensive scale as is mentioned in subsection (1) of section two is nevertheless calculated to create or lead to such a situation, he may make Regulations prohibiting, restricting or otherwise regulating any such action."

On March 11, 1959, the Governor of Northern Rhodesia declared[41] that the circumstances required by section 4A (1) were in existence and accordingly made thereunder the Safeguard of Elections and Public Safety Regulations, 1959. In announcing the making of these Regulations in a broadcast on March 12, 1959, the Governor was at pains to point out, not once, but twice, that he had not declared a state of emergency. The main purpose of the Regulations appears to have been to safeguard the elections which were due to be held on March 20. Regulations made under section 4A (2) come into force on publication in the *Gazette* and remain in force for thirty days provided that the Legislative Council may by resolution extend the life of the Regulations for up to three months beyond the date on which they would otherwise expire.

The Regulations provide first of all in Regulation 3 that whenever the Governor or a Provincial Commissioner is satisfied that a person is participating or immediately intending or preparing to participate in certain specified actions in circumstances in which such action is calculated to or probably will create, or lead to, a situation endangering the public safety, then the Governor or Provincial Commissioner may make a restriction order directing that the restricted person shall not be in such *places* or *area* within the territory as may be specified in the order. The specified actions referred to include the use of force, or threat to use force, to restrain a person from voting; obstruction of a voter; publishing or uttering untrue statements concerning the Government, police, armed forces or public officers with intent to bring into hatred, contempt or ridicule; statements intended to provoke ill-will or hostility between different classes of the population of the territory; causing malicious damage; organising, holding, or participating in, unlawful assemblies; corruption of members of the police force. Under this Regulation, Restriction Orders were immediately served on the leaders of the Zambia National Congress and, in the words of the Governor in a broadcast on March 11, 1959, they were removed to " a place where they could not meet or plot." It is perhaps noteworthy that the word " places " is not defined in the Regulations and it is therefore possible that the places or area from which the restricted person is excluded may be so defined in the Restriction Order as to amount to virtual confinement in one place.

---

[40] Added by cap. 48 of 1957.

[41] Government Notice No. 81 of 1959.

Other provisions in the Safeguard of Elections and Public Safety Regulations deal with public meetings and processions, the carrying of offensive weapons, and powers of search. In particular, Regulation 4 authorises the Governor, a Provincial Commissioner, a District Commissioner or an Assistant Superintendent of Police to prohibit meetings and processions in public places or premises. This merely supplements police powers in connection with meetings and processions under the ordinary law. Regulation 5 prohibits the carrying and possessing of offensive weapons on election day near a polling station or in African locations. As in the Nyasaland Emergency Regulation, " offensive weapon " is defined to mean " any article made or adapted for use for causing or threatening injury to the person, or capable of being in use, or intended by the person having it with him for such use, and includes any knife, stone, axe, axe handle, stick or similar weapon." Possibilities of abuse of power similar to these discussed in relation to Nyasaland obviously arise from this wide definition, including as it does agricultural implements, which are a normal part of the equipment of the African in a rural community. There is a proviso to the Regulation to the effect that the carrying or possession of an offensive weapon solely for a lawful purpose shall not be an offence, but the onus of proving this is on the accused. Finally, Regulation 7 authorises any administrative officer or assistant inspector of police to search without a warrant any premises where he has reasonable cause to believe an offence against the Regulations is, has been, or is about to be committed.

As a safeguard against the danger of regulations being made under the Emergency Powers Ordinance without due cause, section 4B (1) of that Ordinance provides that as soon as practicable after the publication of Regulations made under section 4A the Governor shall appoint a person to inquire into all circumstances which gave rise to the making of the Regulations and to report and make recommendations. An appointment was made under this section on March 18, 1959,[42] and a Report justifying the Governor's action in all respects was published on June 20, 1959.[43] In the recommendations included in the Report, it is, however, stated that a number of grievances concerning, for example, the colour bar were aired by African witnesses in evidence at the inquiry, and the person holding the inquiry was left with the impression that there was substance in some of them and stressed the need for continual and urgent efforts towards their removal.[44]

In Northern Rhodesia semi-emergency powers were invoked in order to nip the emergency in the bud, to deal, that is to say, with the period of mounting tension and unrest preceding an emergency. In Kenya semi-emergency powers have recently been invoked to cope with the post-emergency period of declining tension. It was on March 10, 1952, that an emergency was declared in Kenya and not until November 10, 1959, that the British Government announced that the emergency was to end and the Emergency Regulations to be revoked. The revocation of the Emergency Regulations was not, however, to lead to an immediate return to normal peace-time laws only. Two Ordinances were made conferring semi-emergency powers, namely, the Preservation of Public Security Ordinance, 1959, and the Detained and Restricted Persons (Special Provisions) Ordinance, 1959.[45]

---

[42] Government Notice No. 94 of 1959.

[43] *Report of an Inquiry into all the Circumstances which gave rise to the making of Safeguard of Elections and Public Safety Regulations, 1959*, printed by the Government Printer, Lusaka.

[44] *Ibid.* pp. 33–35.

[45] See *Kenya Gazette Supplement No. 79*, published on November 10, 1959.

The Preservation of Public Security Ordinance, 1959, repeals and replaces the Emergency Powers Ordinance, 1948,[46] which was in terms similar to the United Kingdom Emergency Powers Act, 1920. It is designed as a measure to provide powers, to be brought into operation by the Governor whenever he is satisfied it is necessary, to ensure the preservation of public security at any time when the powers and sanctions under the permanent substantive laws of the country are found to be inadequate for that purpose. The term "public security" is defined to include the various components of the state of law and order, and the powers which are provided for the preservation of that state may be brought into being in two stages: first, when it is necessary to control publications and assemblies but not necessary to make regulations involving the detention of persons without trial or the performance of compulsory work or services; and, secondly, when the latter, more arbitrary and far-reaching powers are required. Both stages could, where conditions in the country so necessitate, be brought into operation simultaneously, or either stage separately without the other, although the second stage can only be brought into operation in conditions in which the first-stage powers would not be, or, if already invoked, have not proved to be, adequate to meet the needs of the situation.

The Detained and Restricted Persons (Special Provisions) Ordinance, 1959, empowers the Governor to make Regulations providing for the detention or restriction of the following categories of persons: persons in respect of whom, immediately prior to the commencement of the Ordinance, a detention order made under Regulation 2 of the Emergency Regulations, 1952, was in force; persons in respect of whom, immediately prior to the commencement of this Ordinance, a restriction order made under Regulation 2A of the Emergency Regulations was in force; persons outside the Colony at the time of the Ordinance whom it would be necessary to control if they entered the Colony, such persons to be listed in the *Gazette* within seven days of the commencement of the Ordinance.

---

[46] Cap. 42.

The powers given by these two Ordinances are clearly much wider in scope than the semi-emergency powers enjoyed in Northern Rhodesia, and in fact fall very little short of those which may be taken in a full emergency. It will be observed that they do not in any way limit the Governor's power to declare a state of emergency under the Emergency Powers Orders in Council of 1939 and 1956. They are simply additional powers replacing the much narrower and controlled powers previously enjoyed under the Emergency Powers Ordinance in Kenya corresponding to the United Kingdom Emergency Powers Act, 1920. Since Regulations made under Emergency Powers Orders in Council, 1939 and 1956, could make exactly the same provision as can be made under the two new Ordinances—the 1939 and 1956 Ordinances do not prescribe that certain Regulations shall be made, but merely empower their making—it is difficult to see what advance is represented by their enactment, other than that they enable the Government to proclaim the end of the emergency without any undue risk. This would seem to have an emotional value only.

Non-Emergency Regulation

In addition to the emergency legislation and semi-emergency legislation which may be invoked to deal with an emergency in a dependent territory, it must not be forgotten that the ordinary law, too, may confer on the executive powers more numerous and wider than those enjoyed in the United Kingdom, and action under the ordinary laws may constitute an integral part of the plan to deal with an emergency. Thus, reference has already been made to the fact that the banning of the Congress Party in Nyasaland, which was a necessary part of the emergency operation, took place under the ordinary law, namely, section 70 of the Penal Code. Having in previous papers in *Current Legal Problems* touched upon the ordinary law in dependent territories concerning such matters as freedom of the Press,[47] freedom of the person[48] and freedom of assembly,[49] it is not intended to dwell upon them at length again here.

---

[47] Vol. 9 (1956), p. 184.
[48] Vol. 10 (1958), p. 151.

However, it may serve a useful purpose to call attention specifically to some of the ordinary laws in Nyasaland (with which territory this paper has been so much concerned) which confer powers similar to those enjoyed under the Emergency Regulations there. Concerning detention and restriction, there exist the Restriction and Security Orders Ordinance of 1954,[50] and the Political Removal and Detention of Africans Ordinance of 1909.[51] The first-mentioned Ordinance provides that the Governor in Council may, if he thinks fit, make a restriction order in respect of any British subject, British Protected Person or Citizen of the Republic of Ireland who is an undesirable person. An undesirable person is defined as " a person who is or has been conducting himself so as to be dangerous to peace, order, good government or public morals, or who is or has been attempting, or conducting himself in a manner calculated, to raise discontent or disaffection amongst Her Majesty's subjects or the inhabitants of the Protectorate, or to promote feelings of ill-will and hostility between different races or classes of the population of the Protectorate." However, a safeguard is provided in that no restriction order in respect of an undesirable person under this Ordinance may be made " except where a judge or magistrate has made a report on the case and the Governor in Council is satisfied, having regard to the findings of fact and any conclusions of law, as stated in the Report, that such an Order may lawfully be made "; the judge or magistrate, however, is not to be bound by any rules of evidence or procedure save that incriminating questions need not be answered. In addition, the Governor is required to report forthwith to the Secretary of State every Order made under this Ordinance.

The Political Removal and Detention of Africans Ordinance, 1909, provides:

> " Whenever it is proved by evidence on oath to the satisfaction of a district commissioner that any African residing or

---

[49] Vol. 11 (1959), p. 95.
[50] Cap. 32 of 1954.
[51] No. 1 of 1909.

> being within his District is conducting himself so as to be dangerous to peace, order, and good government in the Protectorate or in intriguing against Her Majesty's power and authority in the Protectorate the district commissioner may detain any such African as he may consider necessary in the interests of peace, order and good government as aforesaid."

The district commissioner is required to report any such detention forthwith to the Governor. The Governor may then, if he thinks fit, direct that such African shall be detained or removed to another area, but he must in his turn report the matter to the Secretary of State. However, no appeal lies against an order made under the Ordinance. An African detained under this Ordinance is defined in the Ordinance as "a politically detained African"—a strange expression, it may be thought, to find in English law.

In Nyasaland one also finds a Collective Punishment Ordinance passed in 1909[52] which provides:

> "The Governor may impose fines on all or any African inhabitants of any village, area or district or members of any tribe or community if, after inquiry, he is satisfied (*a*) that they or any of them have harboured or failed to take all reasonable means to prevent the escape of any criminal; (*b*) that they or any of them have suppressed or combined to suppress or failed to bring forward evidence in any criminal case; or (*c*) that stolen property having been traced to within the limits of any village area or district, they or any of them have failed or neglected to restore the property or take reasonable steps for tracing it beyond the limits of such village, area, or district; and may order the whole or any part of the fines recovered to be applied in compensation for the injury caused."

As with the Restriction and Detention Ordinances mentioned above, the Governor must report all orders made under this Ordinance to the Secretary of State, but again there is no appeal against any orders so made.

There are also in Nyasaland the usual provisions to be found in dependent territories concerning the carrying of offensive weapons, the control of meetings and processions, control over the import of publications, and similar matters in respect of which additional powers are to be found in the Emergency Regulations. Thus, for example, by the Police Ordinance of 1946, as amended,[53] any person who wishes to hold a meeting or procession in a public road or street or place of public resort must apply to the officer in charge of police for a permit, which will be granted if the officer is satisfied that the meeting or procession is unlikely to cause a breach of the peace or disaffection; and by the Police (Amendment) Ordinance of 1957[54] the Governor may ban all meetings and processions for a period not exceeding three months if he is of the opinion that the powers conferred by other laws are not sufficient to prevent disorders.

---

[52] No. 5 of 1909.

It will thus be observed that the difference between the ordinary law and the emergency laws of dependent territories is one of degree rather than of kind. Under the ordinary law, semi-emergency laws and emergency laws, the executive in British dependencies enjoy ample powers to cope with any emergency, some of the laws indeed conferring a discretion which is dangerously wide, as the Devlin Commission Report indicates. The time for a review of the whole problem of civil liberties in our dependent territories is perhaps ripe.

---

[53] No. 26 of 1946, as amended by No. 9 of 1947, Nos. 21 and 29 of 1953, No. 33 of 1954 and No. 37 of 1958.

[54] No. 6 of 1957.

THE PRESENT IMPORTANCE OF PLEADINGS

I. H. Jacob

When it happens, as it does more often than is thought, that a case turns or appears to turn on a question of pleading, there is a temptation to think that pleadings play perhaps too prominent, and at times too crucial, a part in civil litigation. The impression is created that the court pays more regard to form than substance, to the state of the pleadings than the justice of the case. In 1876, James L.J. said[1]:

> "This case reminds me of a saying of the late Mr. Jacob[2] that the importance of questions was in this ratio: first, costs; second, pleading; and third, very far behind, the merits of the case."

The question may be asked, what is the true importance of pleadings in our procedural system today? Let me illustrate the problem by reference to a few recent cases taken at random.

Illustrative Cases

In *Leaf* v. *International Galleries*[3] the use of the one word "warranty" in the plaintiff's pleading would have won him his case; its omission lost him the case,[4] although he thereby provided the occasion, which might not otherwise have arisen, for some very valuable judgments in the Court of Appeal on the question of the rescission of an executed contract for the sale of goods on the ground of innocent misrepresentation.

---

[1] *Hall* v. *Eve* (1877) 4 Ch.D. 341, at p. 344. James L.J. gave a different version of this saying in *Att.-Gen.* v. *Earl of Lonsdale* (1870) 23 L.T. 794, quoted by Megarry, *Miscellany-at-Law* (1955), p. 258.

[2] Probably Edward Jacob, Q.C., a Bencher of Lincoln's Inn, and editor of Jacob's *Reports* and Jacob and Walker's *Reports, Chancery*.

[3] [1950] 2 K.B. 86.

[4] Leave to amend was refused at the trial. The omission to plead an *implied* warranty is not fatal: see Denning L.J. in *Shaw* v. *Shaw* [1954] 2 Q.B. 429, at p. 441.

In *Whall and Another* v. *Bulman*[5] the plaintiffs' pleading disclosed no cause of action on the face of it (inasmuch as it claimed possession of premises for breach of a tenancy agreement without alleging any right of re-entry or forfeiture for such breach); and although this point was not taken by the defendant or the trial judge, the Court of Appeal of its own motion took the point, and reversed the decision on the merits in favour of the plaintiffs, on the ground that the plaintiffs' claim as pleaded was not maintainable, and should not have been decided on the merits at all.[6]

In the leading case of *Esso Petroleum Co., Ltd.* v. *Southport Corporation*[7] the plaintiffs lost their claim because they failed to prove the only negligence they pleaded, *viz.*, the personal negligence of the master in navigating the oil tanker on the particular voyage in question; and since they pleaded no allegation of unseaworthiness, they could not contend that the shipowners had failed to prove that the vessel was seaworthy when put out to sea. The cry of Singleton L.J.[8] that the decision in the case ought not to turn on any question of pleading was stifled by the House of Lords, who decided the case precisely on the state of the pleadings.

If in the *Esso Petroleum* case[9] the pleading was too narrow, in *J. Spurling, Ltd.* v. *Bradshaw*[10] it was too wide. Instead of simply pleading that the warehousemen to whom goods were entrusted for storage returned them in a damaged condition, and thereby placing the burden of proof on them to show that the goods were damaged without their fault, or that their fault was excused by an exempting clause, the bailors pleaded positive allegations of negligence in storage. This enabled the warehousemen to rely upon an exemption clause excluding liability for precisely such negligence, although they stoutly maintained that they were not negligent at all.

---

[5] [1953] 2 Q.B. 198.

[6] "The parties cannot agree on a false hypothesis and ask the court to adjudicate upon it": *ibid. per* Denning L.J. at p. 202. *Cf. Royster* v. *Cavey* [1947] K.B. 204, where the pleadings proceeded on the fictitious basis that the defendant nominated by the Crown was the employer of the plaintiff and the occupier of the Ministry of Supply factory; the Court of Appeal refused to entertain the appeal on the merits. This decision marked an important stage leading to the passing of the Crown Proceedings Act, 1947.

[7] [1956] A.C. 218.

[8] [1954] 2 Q.B. 182, at p. 192.

[9] *Loc. cit.*, above, in n. 7.

[10] [1956] 1 W.L.R. 461, see particularly Denning L.J. at p. 466.

In *Davie* v. *New Merton Board Mills, Ltd.*[11] the original defence of the defendants, which was a simple traverse of the alleged negligence that a drift supplied by them for the use of the plaintiff was defective, was held by Havers J. to preclude them from raising the case that they were not negligent because they had purchased the drift from reputable manufacturers. If the defendants had not obtained an adjournment of the trial to amend their defence by specifically raising the matters they relied on (which the House of Lords later held[12] sufficed to defeat the plaintiff's claim), they would presumably, before Havers J., have lost their case on the basis of their pleading.

In *G. L. Baker, Ltd.* v. *Medway Building & Supplies, Ltd.*,[13] the defendants did in fact lose their case on the basis of their defence as pleaded, which the trial judge refused them leave to amend and judgment was entered against them for £6,161. They were only able to have this judgment set aside and to have a new trial on the merits, by persuading the Court of Appeal to give them leave to amend their original defence, on the ground that there had been a genuine misunderstanding by an experienced pleader of a somewhat obscurely formulated statement of claim.

In *Warner* v. *Sampson*[14] the common form of general traverse in the defence of a tenant, even though it had been inserted inadvertently, and even though it had been deleted by amendment before trial, was held by Ashworth J. to be fatal to the tenant on the ground that he thereby denied the landlord's title and forfeited the lease, and he could not be given relief from such forfeiture; and it required the Court of Appeal to give a true appraisal of a general traverse as simply putting the plaintiff to proof, and to allow the case to be decided on its true merits.[15]

---

[11] [1956] 1 W.L.R. 233.

[12] [1959] A.C. 604.

[13] [1958] 1 W.L.R. 1216, reversing [1958] 2 All E.R. 532 (Danckwerts J.).

[14] [1959] 1 Q.B. 297, reversing [1958] 1 Q.B. 404 (Ashworth J.) and overruling *Kisch* v. *Hawes Brothers, Ltd.* [1935] Ch. 102.

[15] A general traverse in a libel action does not amount to a plea of justification: *per* Denning L.J., *loc. cit.*, at p. 311.

ROLE OF THE COURT AND THE FUNCTION OF PLEADINGS

The above examples show the part played by pleadings in modern civil litigation. They show that in each case the court has first to examine the pleadings, and then to decide the case in the light of, or more properly on the basis of, the pleadings. This central role of pleadings is best understood as, and perhaps is no more than, a reflection of the role of the court itself in adjudicating on civil disputes between the parties. The court acts as a kind of umpire to decide the matters in controversy between the parties [16]; it plays, not an active, but only a passive, role in relation to the raising of the issues for its consideration and determination. The court must, therefore, ascertain from the parties themselves what are the matters in dispute between them. It is the function of pleadings to inform the court of these matters, and to define the issues between the parties. Without pleadings, the court is left to grope for the questions in dispute between the parties, and must somehow require the parties to frame the questions for decision. In this sense, there is in civil litigation an overriding need for pleadings whereby the issues between the parties, upon which alone the court can adjudicate, can be raised speedily, clearly and precisely.

Let me develop this fundamental point more fully. As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings that in doing so he must set out all the material facts on which he relies in support of his claim or defence, as the case may be,[17] and that in answering the previous pleading of his opponent, he must not be evasive but answer the point of substance and deal specifically with each allegation of fact of which he does not admit the truth.[18] For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without the leave of the court.[19] Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves. It is no part of the duty or function of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings.[20] Indeed, the court would be acting contrary to its own character and nature, if it were to pronounce upon any claim or defence not made by the parties. To do so would be to enter the realms of speculation and perhaps even of fancy. Moreover, in such event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised, by or against a party is equivalent to not hearing him at all and may thus be a denial of justice.[21] The court does not provide its own terms of reference or conduct its own inquiry into the merits of the case, but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial by their pleadings,[22] and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called " Any other business," in the sense that points other than those specified may be raised without notice.

---

[16] Holdsworth, *History of English Law*, Vol. IX (1926), pp. 280–281.

[17] R.S.C., Ord. 19, r. 4.

[18] R.S.C., Ord. 19, rr. 17 and 19.

[19] Except under R.S.C., Ord. 28, r. 2.

PERVASIVE IMPORTANCE OF PLEADINGS

Moreover, pleadings do not only define the issues between the parties for the final decision of the court at the trial; they manifest and exert their importance throughout the whole process of the litigation. They contain the particulars or the allegations of which further and better particulars may be requested or ordered, which help still further to narrow the issues or reveal more clearly what case each party is making.[23] They limit the ambit and range of the discovery of documents[24] and the interrogatories that may be ordered.[25] They show on their face whether a reasonable cause of action or defence is disclosed.[26] They provide a guide for the proper mode of trial,[27] and particularly for the trial of preliminary issues of law or fact.[28] They demonstrate upon which party the burden of proof lies, and who has the right to open the case. They act as a measure for comparing the evidence of a party with the case which he has pleaded. They determine the range of the admissible evidence which the parties should be prepared to adduce at the trial.[29] They delimit the relief which the court can award.[30] They provide the basis for the defence of *res judicata* in subsequent proceedings by reference to the record in the earlier proceedings.

---

[20] " In a civil suit the function of a court in this country . . . is not inquisitorial ": Pearce L.J. in *Fallon* v. *Calvert* [1960] 1 All E.R. 281, at p. 282.

[21] *Cf.* Lord Radcliffe in *Esso Petroleum Co., Ltd.* v. *Southport Corporation* [1956] A.C. 218, at p. 241.

[22] See Morris L.J. in *Esso Petroleum Co., Ltd.* v. *Southport Corporation* [1954] 2 Q.B. 182, at p. 207.

[23] The refusal to order further particulars may end an action, as in *Liversidge* v. *Anderson* [1942] A.C. 206, where particulars were refused of the grounds upon which the Secretary of State had reasonable cause to believe that the plaintiff ought to be detained under Reg. 18B of the Defence Regulations; or the particulars given may show that the claim cannot be supported, as in *Ward* v. *Lewis*

From what has been said, it is abundantly apparent how pervasive is the influence and importance of pleadings throughout all the stages of an action. It may, indeed, fairly be claimed that pleadings play a central, if not a predominating, part in civil litigation in the High Court and nowadays very largely in the county court, too. This role results from the very nature and character of pleadings, for the attention of the parties as well as the court is necessarily focused and riveted to the pleadings as being the

---

[1955] 1 All E.R. 55, where the particulars stated that no special damage was alleged in an action for slander; or they may enable a payment into court to be made, as in *Monk* v. *Redwing Aircraft Co., Ltd.* [1942] 1 K.B. 182 (C.A.), and *Phipps* v. *Orthodox Unit Trusts* [1958] 1 Q.B. 314; or they may limit the amount of the claim, as, *e.g.*, particulars of damage for breach of warranty; or they may determine whether a party's claim exceeds £200 and so gives him a right of appeal from the county court on a question of fact, *Leslie* v. *Liverpool Corporation* [1959] 3 All E.R. 898.

[24] R.S.C., Ord. 31, r. 12.

[25] R.S.C., Ord. 31, r. 1 (proviso).

[26] See *Prince* v. *Gregory* [1959] 1 W.L.R. 177 (C.A.); *Fowler* v. *Manning* [1959] 1 Q.B. 426 (Diplock J.).

[27] Whether with or without a jury, see *Shordiche-Churchward* v. *Cordle* [1959] 1 W.L.R. 351; or to transfer to the commercial court, or to an official referee or to the county court, or from one Division of the High Court to another.

[28] See *Adler* v. *Dickson* [1955] 1 Q.B. 158 (C.A.); *Addis* v. *Crocker* [1959] 3 W.L.R. 527 (Gorman J.).

[29] See Brett L.J. in *Phillips* v. *Phillips* (1878) 4 Q.B.D. 127, at p. 133: "If parties were held strictly to their pleadings under the present system they ought not to be allowed to prove at the trial, as a fact on which they would have to rely in order to support their case, any fact which is not stated in their pleadings." This rule is much relaxed nowadays due, as Morris L.J. has said, to "every reasonable latitude being given to prevent parties being unduly fettered by any defects in pleading": *Donoghue* v. *Huyton U. D. C.*, 1951/78 (C.A.), unreported.

[30] See Warrington J. in *Re Wrightson* [1908] 1 Ch. 789, at p. 799: "The plaintiffs are not entitled to relief at the trial except in regard to that which is alleged in the pleadings and proved at the trial."

nucleus around which the whole case revolves throughout all its stages.[31] The respective cases of the parties can only be considered in the light of and on the basis of the pleadings; and in this sense, that the parties may be assumed to have put forward the best case they have in the best way they can, the pleadings do take a place of prior importance to the merits of the case. This may sound as though one is preferring form to substance, and elevating the technicalities above and beyond the justice of the case; but inasmuch as the merits of the case may be said to be revealed by the pleadings, I do not think this charge is well founded.

It should further be remembered that the court has very ample powers of granting leave to amend the pleadings for the purpose of determining the real questions in controversy between the parties.[32] While, therefore, it is true that the pleadings act as fetters upon the parties, binding and circumscribing them closely and strictly to their own cases as pleaded, either party can apply to the court to free him from such fetters and to allow him to amend his pleading so as to put forward his case as he decides. The general principle is that the court will grant leave to amend, as long as the application is made bona fide and would not occasion injury or prejudice to the opposite party which could not be compensated for by costs or otherwise.[33] Amendments will, of course, be more readily granted before than at the trial, but in a proper case the court may give leave to amend at the trial,[34] and even after the close of all the evidence,[35] and even after judgment.[36] The powers of amendment have the salutary effect of reducing to a minimum the number of cases which turn solely on a point of pleading.

---

[31] In the Chancery Division, it is the almost invariable practice for the whole of the pleadings to be read during the course of the opening of a witness action; in the Queen's Bench Division, the practice is not so general.

[32] R.S.C., Ord. 28, rr. 1 and 12.

[33] See the authorities referred to and applied by Jenkins L.J. in *G. L. Baker, Ltd.* v. *Medway Building & Supplies, Ltd.* [1958] 1 W.L.R. 1216, at p. 1232 *et seq.*, and particularly *Tildesley* v. *Harper* (1876) 10 Ch.D. 393. (1878)

[34] As in *Davie* v. *New Merton Board Mills, Ltd.* [1956] 1 W.L.R. 233; and see *J. Leavey & Co., Ltd.* v. *G. H. Hirst & Co., Ltd.* [1944] 1 K.B. 24, particularly observations of Lord Greene M.R., at pp. 27–28.

[35] *Loutfi* v. *Czarnikow, Ltd.* [1952] 2 All E.R. 823 (Sellers J.); *contra Edevain* v. *Cohen* (1890) 43 Ch.D. 187 (C.A.).

[36] *Pearlman (Veneers) S.A. (Pty) Ltd.* v. *Bartels* [1954] 3 All E.R. 659; *Thynne* v. *Thynne* [1955] P. 272. In *Bradford Third Equitable Benefit Building Society* v. *Borders* [1941] 2 All E.R. 205 the House of Lords held that the Court of Appeal had wrongly allowed an amendment of the pleadings to add a further charge of fraud.

SHOULD PLEADINGS BE ABOLISHED OR DISPENSED WITH?

The importance of pleadings is so generally accepted throughout the legal profession that nowadays hardly anyone ventures to suggest that pleadings should be abolished. This was not always so, for some eighty years ago there was much debate concerning the abolition of pleadings.[37] In 1880, the Committee on Procedure, presided over by Lord Coleridge C.J., was expected to recommend such abolition; and indeed it did recommend that no pleadings should be delivered in any action except with the leave of the court.[38] This recommendation was embodied in a rule made in 1897; but in practice the court granted its leave almost as a matter of course, and the rule became otiose and was accordingly revoked in 1933, since when pleadings up to the stage of a reply can be delivered without an order of the court.

Nevertheless, there is still a tendency in some quarters, no doubt with the best will in the world, to belittle the importance of pleadings, and propose measures for dispensing with pleadings. Let me examine two of the major recommendations of the Evershed Committee concerning pleadings.[39] ۱۹۵۳

TRIAL WITHOUT PLEADINGS

The first of these recommendations was that the parties should be encouraged in appropriate cases to dispense with pleadings and should go to trial without pleadings.[40] The underlying notion was that, in certain cases, the issues between parties had already been or could be stated with clarity and precision, and that as the object of pleadings was or could be thus achieved, the pleadings could be dispensed with.

---

[37] See, *e.g.*, 25 S.J., p. 803; 26 S.J., pp. 69 and 90. In its issue for December 31, 1881 (27 L.T., p. 145), the *Law Times* made this comment: "The appearance of a new edition of a work devoted to nothing but precedents of pleadings shows that some people refuse to believe in the abolition of pleading. Lord Coleridge's Committee we should imagine will regard the publication as an ill-timed satire upon their sagacity. We are not surprised, however, that the venerated Bullen and Leake should refuse to be snuffed out by a Committee."

[38] See the Report printed in full in 25 S.J., at p. 911 *et seq*. On pleadings, the Committee stated that they were "of opinion that, as a general rule, the questions in controversy between litigants may be ascertained without pleadings." This Report contains a number of similarities with the Report of the Evershed Committee, especially in the matter of a comprehensive and robust summons for directions; see below, n. 39.

[39] *Final Report of the Committee on Supreme Court Practice and Procedure, 1953* (Cmnd. 8878—1953).

This recommendation was embodied in a new Order, called Order 14B, made in 1955. Under this Order, the plaintiff has the option of indorsing the writ with a notice that he intends to apply for trial without pleadings. Such an application must be supported by an affidavit, made by the plaintiff, or by any person who can swear positively to the facts:

(a) summarising the questions believed to be at issue between the parties; and

(b) indicating, so far as necessary, the grounds for the contention that the case is suitable to be tried without further pleadings.

This procedure was designed to enable a plaintiff to obtain a decision speedily and more cheaply, but nevertheless it has been attended with complete failure, due not to the fault of the legal profession, and particularly the Bar, to respond to the " new approach " so optimistically called for by the Evershed Committee, but to the inherent unsuitability of this new Order as a procedural device, and especially to its unnecessarily elaborate and cumbersome procedure. It is very seldom that the plaintiff's legal advisers can say with confidence, especially before the proceedings have commenced, and much less can they allow the plaintiff to swear, that the case is suitable to be tried without pleadings. In practically every case in which Order 14B could be operated, it would be possible to achieve a similar objective, *i.e.*, a speedy trial, by some other procedure, either by an order for the trial of preliminary issues of fact or law as disclosed by the pleadings or by the procedure of originating summons. Moreover, in cases other than those in which only points of law or of construction arise, there are further difficulties of trying to dispense with pleadings, among which I may mention:

---

[40] *Ibid.* p. 32 *et seq.*, and Appendix V, p. 361 *et seq.*

1. that it is not easy to express what the issues are with clarity or precision without stating the whole case of each party;
2. that one party would usually prefer to state his own case rather than to have the opposite party state it for him; and
3. that alternative, and still more inconsistent, claims or defences are better left to be raised by the party wishing to put them forward.

For these reasons, ever since it was made, there has been a marked reluctance to use the procedure provided by Order 14B for trial without pleadings; and this reluctance was greatly increased when, in 1956, the Court of Appeal ruled[41] that once a plaintiff exercised his option to apply for trial without further pleadings under Order 14B, he could not make an application for summary judgment under Order 14, with which Order 14B had no connection whatsoever save the similarity of numbers. The result has been that Order 14B as a procedural device for trial without pleadings has become virtually a dead letter. Since 1955, a total of only fifteen writs have been issued under this Order, of which twelve were issued in 1955.

It should be mentioned that the idea that the plaintiff should be able to ask for trial without pleadings was not new in 1955. It had, in fact, been introduced in 1897, when a new Order 18A was added to the Rules of the Supreme Court. But that Order also fell into disuse and was annulled in 1917, from which it will be seen that there is little new under the sun. I would respectfully suggest that the experiment of trial without pleadings can be said to have been sufficiently tried and found wanting, and that accordingly Order 14B ought now to be annulled.

PROCEDURE BY ORIGINATING SUMMONS

The second major recommendation concerning pleadings made by the Evershed Committee was for the more extended use of the procedure by way of originating summons.[42] Under this procedure there are no pleadings but, where the facts are contested, affidavits are filed by both parties, each of whom can, if necessary, obtain an order that the deponents attend the trial for cross-examination. The advantages of this procedure, which is widely used in the Chancery Division, are said to be that it enables the action to be determined speedily and at less cost, and that before the trial, each party knows the whole of the evidence given by the opposite party, subject to cross-examination.

---

[41] *Commissioners of Customs and Excise* v. *Anco Plant and Machinery Co., Ltd.* [1956] 1 W.L.R. 1048.

[42] *Loc. cit.* in n. 39 above, p. 30 *et seq.*, and Appendix IV, p. 358 *et seq.*

In relation to proceedings where the only questions for decision are points of construction or where the very nature of the claim delimits the issues raised, as where a claim for provision is made under the Inheritance (Family Provisions) Act, 1938, there are clear advantages in the procedure by way of originating summons. But in all other cases, and particularly where there are likely to be contested issues of facts and of the law arising out of the facts as proved, it seems to me, with great respect, that there are distinct disadvantages in this procedure leading to trial without pleadings.[43] Among such disadvantages, the following may be listed:

1. The issues cannot emerge until after the close of the *evidence* filed by the parties;
2. The issues can only be defined by analysing the evidence of the parties, if necessary after the close of the evidence *at the trial*;
3. It is difficult as well as artificial to raise by means of affidavits which are meant to deal with facts only, issues or contentions which are conclusions arising out of the facts as, for example, a plea of waiver or of estoppel;
4. Issues may be raised at the trial which have not been raised in the affidavits, and so take the opposite party by surprise[44];
5. Discovery on an originating summons cannot be obtained, except upon special circumstances being shown[45];

---

[43] See the remarks of Wynn-Parry J. in *Re Camkin's Questions* [1957] 1 W.L.R. 255, where he complained of the inconvenience, almost amounting to frustration, of the originating summons procedure in a complicated contested case.

[44] *e.g.*, an objection to the jurisdiction: see *Re No. 1 Albemarle Street* [1959] 1 All E.R. 250.

[45] *John Miller (Shipping) Ltd.* v. *Port of London Authority* [1959] 2 All E.R. 713.

6. Further and better particulars of the allegations in the affidavits cannot be ordered.

These considerations lead me to urge, with respect, that the recommendations of the Evershed Committee regarding the extension of the procedure by originating summons should be reviewed and reversed.

I think that the use of the procedure of originating summons should be confined to a very restricted and limited range of cases, namely, as I have earlier indicated, only to those cases where the question at issue is one of construction or where the very nature of the claim delimits and specifies the issue raised. The twin objects of more speed and less cost, and the inestimable advantages of clarity and precision in the preparation, presentation and consideration of the facts and the relevant law, can be better achieved by extending the range of proceedings in which the issue of a writ followed by pleadings is the usual normal course, even including most of the contentious proceedings in the Chancery Division, and especially such cases as claims for a new tenancy under the Landlord and Tenant Act, 1954 (which by some strange mischance has been assigned exclusively to the Chancery Division).

The procedure by originating summons without pleadings in which the issues between the parties are not defined before, but only after, the evidence in the case goes back to an earlier time than the procedure in England in the sixteenth century when the system of exchanging written pleadings enabled the parties to arrive at an issue before the trial, and to an earlier time than the procedure in Rome at the time of Augustus when the formulary system enabled the parties to arrive at an issue before the trial.

I have shown, I think, that not only should pleadings not be abolished or even dispensed with, but that the range of cases in which they can usefully be employed ought to be much extended. The experience of litigation in the county court has also shown the value and importance of pleadings, for whereas in the early days of the county court system pleadings were not normally used, which led to frequent adjournments and increased costs, nowadays much greater use is made of pleadings in county court actions. Indeed, nowadays, in contested actions in the county court, almost invariably there are pleadings in substantially the same form and having the same significance and importance as in actions in the High Court.

COSTS AND FORM OF PLEADINGS

I should perhaps deal shortly with two criticisms that are made of pleadings, the first on account of their costs, and the second on account of their form.

First, it is said that the costs attributable to pleadings form a substantial part of the costs of an action, and that any reform of procedure should start with pleadings, for thereby the costs of litigation could be substantially reduced. I do not pretend to know and cannot say what is the precise amount or proportion of costs which can be said to be attributable to pleadings, but what I do confidently assert is that without pleadings the costs of litigation would be much greater than they are with pleadings. In many instances, by revealing the strength or weakness of their respective cases through their pleadings, the parties are led to a settlement or compromise which they might not otherwise make, and thereby the costs are much reduced or kept down. In many other cases, the narrowing of the issues by the pleadings, and the consequent limitation upon the range of discovery and evidence, helps to reduce the costs. In all cases, the costs of the pleadings are as much a necessary part of the costs of litigation as are the costs of the evidence required to prove the case. I, therefore, do not think that the criticism of pleadings on the ground of their costs has much, if any, force at all.

Secondly, it is said that pleadings nowadays are cast in a specialised and standardised form and are expressed in rather formalistic and technical language, which prevents or hinders the emergence of the true issues in the case. It must be remembered that those whose task is to read and understand the pleadings are familiar with the standard forms and the language used, and it is to them, indeed, that the pleadings are addressed, so that there is little room for misunderstanding. It is very seldom these days that the language of a pleading has itself to be construed; and in such cases of doubt, the matter would probably be resolved by an appropriate amendment. Moreover, it is on the whole inevitable that pleaders shall adhere to the forms they know rather than fly to those which they do not, and if the present forms and formulas were disused, a new or fresh set of forms and formulas would soon come into being. There has, I think, in recent times been a fall in the general standard in which pleadings are drafted—a good deal of laxity, lack of clarity, loose expressions and inattentiveness to the rules; an improvement can be brought about only by the courts insisting upon a higher standard in pleading. But on the whole, I am of the opinion that the form in which pleadings are cast today is not unsatisfactory, and although somewhat standardised, neither over-subtle nor too technical.

Suggestions for Improving System of Pleadings

I want now to put forward for consideration some tentative suggestions for improving the system of pleadings, so as to compel the parties to reveal more of their cases than they now do and help to reduce still further the number of cases in which the decision of the court will turn upon a mere technical question of pleadings. They are designed to prevent, not only surprise at the trial, but surprise at the result of the trial.

1. *General denial*

At common law, the plea of the general issue, while it had the advantage of closing the pleadings and thereby bringing about an earlier trial, had the overwhelming disadvantage of concealing what were the real questions in controversy between the parties. As Cotton L.J. said[46]:

> "The old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial."

The transformation in the system of pleadings brought about by the Judicature Acts of 1873 and 1875 was to require the parties to plead, not the legal conclusions which they contended should be put on the facts which if necessary they were prepared to prove, but all the material facts on which they relied; and one of the main objects of the new system of pleadings was to abolish the use of the general issue. The rules designed to achieve this object were clear and specific.

---

[46] *Spedding* v. *Fitzpatrick* (1888) 38 Ch.D. 410, at p. 414 (C.A.), and he added that "under the present system it is our duty to see that a party so states his case that his opponent will not be taken by surprise."

Order 19, r. 17, provides:

> "It shall not be sufficient for a defendant in his defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counterclaim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages."

Order 19, r. 19, provides:

> "When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so evasively, but answer the point of substance."

These rules would seem clearly to have put an end, once and for all, to the use of the general denial, and to require the defendant to deal specifically with each separate allegation of fact, so that it would become clear which facts were in issue and which were not.[47] But ever since 1893,[48] a defendant has been allowed to plead a general denial, even though the plaintiff may be left, as he so often is, in genuine doubt what part of his case is in issue. The practice of pleading a general denial has now become very common, and almost every pleading on behalf of a defendant contains a general traverse.[49] Most often, by a general denial, the defendant intends no more than to put the plaintiff to the proof of his case, and so long as this is made clear, I do not think any harm is done by it; but quite often a general denial may conceal some of the facts on which the defendant relies to escape liability or may confuse the issues by denying facts which if dealt with separately could only have been admitted. In such a case, the result is that the general denial does not reveal, but tends to conceal, what are the real issues between the parties.

---

[47] These rules were so understood by Jessel M.R. in *Thorp* v. *Holdsworth* (1876) 3 Ch.D. 637, and by Thesiger L.J. in *Byrd* v. *Nun* (1878) 7 Ch.D. 284, at p. 287, who said that "the new rules were expressly framed . . . to make the defendant take matter by matter and traverse each of them separately."

[48] *Adkins* v. *North Metropolitan Tramway Co.* (1893) 10 T.L.R. 173.

[49] See Lord Denning in *Warner* v. *Sampson* [1959] 1 Q.B. 287, at pp. 310–311. An extreme instance of the use of the general denial is the case of *John Lancaster Radiators, Ltd.* v. *General Motor Radiator Co., Ltd.* [1946] 2 All E.R. 685 (C.A.).

I will give one example since there is little space to develop the matter fully. In an action for negligence, the defendant is not bound to plead inevitable accident[50]; but it is enough if he simply denies the negligence as alleged or at all. He can under such a general denial lead evidence at the trial as to facts designed to show that the accident happened without any negligence on his part. Those facts, which he need not plead, will in general be unknown to the plaintiff, who could well be taken by surprise at the trial.

I think the general denial or general traverse is out of keeping with the basic object of pleadings, which is to reveal the real issues between the parties, and I would respectfully urge that its use should be limited only to the cases in which it is intended simply to put the plaintiff to proof of his case. It should not be permitted either where the defendant is proposing to rely on facts which have not already been pleaded, or where he is denying collectively a number of facts, some of which, if dealt with individually, would have to be admitted or not put in issue. The court should have power, wherever it considers it necessary or desirable for the fair disposal of the case or for saving costs, to order the defendant to clarify a general denial or traverse.

2. *Further particulars or statement of the case*

Particulars have the great merit of revealing more fully the cases pleaded by the parties, and by limiting the generality of the allegations made in the pleadings, they define the issues more precisely and prevent surprise at the trial.[51] That is why there is so often a contest between the parties, on the one hand, to get as much as possible by way of further particulars of the pleadings of the opposite party and so to tie him down and to narrow the issues, and, on the other hand, to avoid giving such particulars and so to keep the issues as wide and general as possible.

---

[50] *Rumbold* v. *L.C.C.* (1909) 25 T.L.R. 541 (C.A.).

[51] See Cotton L.J. in *Phillips* v. *Phillips* (1878) 4 Q.B.D. 127, at p. 139, and in *Spedding* v. *Fitzpatrick* (1888) 38 Ch.D. 410, at p. 413; and Watkin Williams J. in *Thomson* v. *Birkley* (1882) 47 L.T. 700, who thought particulars "ought to be encouraged."

Such a contest tends to magnify and perhaps even exaggerate the importance of pleadings. Except where the request for the further particulars is unsupportable as a matter of law,[52] or where a party cannot be expected to give the further particulars requested until after discovery,[53] it seems to me that it would greatly assist the course of litigation if further particulars were more readily ordered and on a wider basis than at present, even though this may result in a party having to disclose perhaps some of the details or evidence of his case.[54] This wider approach would require an authoritative change in practice, since at present particulars are ordered on a rather strict and narrow basis; but I think such an approach would reduce the contests about particulars to a minimum, and by revealing a great deal more of the cases put forward by the parties would help to narrow the issues between them, and so greatly reduce costs.

I would also urge that where it is necessary or desirable for fairly disposing of the case or for saving costs, the court should exercise more freely the power to order a party to deliver a statement of the nature of the case relied on, even in respect of a denial and especially of a general denial. The purpose would be to clarify the nature of such a denial and to reveal the real issues between the parties. This, too, would require a change in practice and even of the law, since at present further particulars are only ordered of affirmative allegations.[55] I would add, however, that where one party requires his opponent to deliver a statement of the nature of the case relied on, he should himself be prepared to state the nature of the case relied on by him, and such statements should be exchanged. It may well be that such statements will contain the evidence or some of it relied on by the parties; but as the parties will have exchanged such statements, there will be no opportunity for either of them to tamper with witnesses or to manufacture evidence to contradict the evidence of the opposite party, which are said to be the grounds why a party is not bound today to discover the evidence of the case.

---

[52] As, *e.g.*, *Liversidge* v. *Anderson* [1942] A.C. 206.

[53] See Bowen L.J. in *Millar* v. *Harper* (1888) 38 Ch.D. 110, at p. 112.

[54] Notwithstanding the decision of the Court of Appeal in *James* v. *Radnor C. C.* (1890) 6 T.L.R. 240, that a defendant cannot be ordered to give particulars of his allegation that the plaintiff's charges are excessive and unreasonable, it is common practice for such particulars to be ordered in actions tried before the Official Referee, in what is called a Scot Schedule, to the advantage of all parties.

[55] Including, of course, a pregnant negative, *i.e.*, a concealed affirmative allegation: see *Pinson* v. *Lloyds and National Provincial Foreign Bank, Ltd.* [1941] 2 K.B. 72.

3. *Particulars of conditions of mind*

There is one aspect of further particulars which deserves special mention. It is provided by Order 19, r. 22, that wherever it is material to allege malice, fraudulent intention, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred. In *Burgess* v. *Beethoven Electric Equipment, Ltd.*[56] the Court of Appeal applied this rule strictly and, contrary to the previous practice, refused to order particulars of an alleged "intention," as being a condition of the mind. This decision has, of course, been faithfully followed; and indeed it has given rise to a misconception which is widely held, that particulars cannot be ordered of an allegation that a party "ought to have known" certain facts. It is thought that such an allegation postulates a condition of the mind, whereas in fact it assumes, not knowledge, but ignorance and amounts to no more than saying that from the surrounding facts and circumstances the court will be asked to infer that, although the party did not *know* the particular matters in question, he should be treated as though he knew, because he *ought to have known*, those matters.

In 1949 an inroad was made into this rule by the addition of a proviso which required that in an action for defamation, an allegation of express malice in a reply to destroy a defence of privilege or fair comment, must be supported by particulars. In 1959, on a somewhat similar rule relating to notice, the Court of Appeal was able to apply the proviso to that rule, and to order particulars of notice to be given, though after discovery.[57]

---

[56] [1943] K.B. 96 (C.A.).

It seems to me that rules 22 and 23 of Order 19 are out of keeping with the main object of pleadings, and I would respectfully urge that they should be annulled. I know that this would be greatly welcomed by practitioners, who indeed find it hard to understand the reasons for these rules.

4. *Interrogatories*

Interrogatories have very largely fallen into disuse, due, as I think, to a misconception of their true function, and also to lack of skill and confidence in their use. The real object of interrogatories is to obtain admissions, either to assist a party to prove his case or to destroy the case of his opponent.[58] In this way, they help to remove from the realm of dispute questions as to which there is no real issue. The power to administer interrogatories is at present limited to such interrogatories as the court considers "*necessary* either for disposing fairly of the cause or matter or for saving costs."[59] I think such powers ought to be extended to such interrogatories also which the court considers "*desirable*" for disposing fairly of the case or for saving costs. This extended power will enable interrogatories to be more widely used; and while no one suggests that any case should be tried on affidavits, made in answer to interrogatories, the more extended grant of interrogatories will bring a large number of cases to an earlier end, and narrow the real issues in dispute in a great many more, to the advantage of all parties concerned.

I further think that the whole of any interrogatories administered and the answers thereto should always be placed before the court, as part of the record. At present a party administering interrogatories is entitled at the trial to ignore them or the answers to them, or to use any one or more of the answers or any part of an answer as he pleases, although in the latter case, the judge may look at the whole of the answers, and direct them to be put in.[60] It seems to me that this is not a good system and that the judge at the trial should always be informed that one party has interrogated the other, and he can then give such weight to the interrogatories and the answers as he thinks fit; but it should still be open to a party to put in, as part of his own case, only such of the answers or part thereof as he desires. This would discourage the use of interrogatories except in proper cases, and also discourage the answers being couched in language intended to prevent the opposite party using them.

---

[57] *Cresta Holdings, Ltd.* v. *Karlin* [1959] 1 W.L.R. 1055.

[58] See Cotton L.J. in *Att.-Gen.* v. *Gaskill* (1882) 20 Ch.D. 519, at p. 528, quoted by Tomlin J. in *Duke of Sutherland* v. *British Dominions Land Settlement Corporation* [1926] Ch. 746, at p. 753, where he said: "The administering of interrogatories seems to me to be, generally speaking, a step which is more often desirable than undesirable and to be encouraged rather than to be discouraged, because they not infrequently bring an action to an end at an earlier stage than otherwise could be the case, to the advantage of all parties concerned."

[59] R.S.C., Ord. 31, r. 2.

CONCLUSION

I would like to conclude by recalling what Sir William Holdsworth has said about the importance of pleadings under the old system in the development of the law and the lawyers. He said[61]:

> "Firstly, it [the system of pleading] had a principal share in introducing our modern view as to the binding force of decided cases, and it ensured the success of this method of developing the law. Secondly, it has helped the lawyers to build up a logical doctrine on the foundation of the forms of action. Thirdly, the searching technical learning which it imposed, gave to the best lawyers a very complete mastery of the principles of the common law, to which was due in no small degree the success with which they have from age to age developed and adapted them to the needs of the age."

Allowing for the changes in the system of pleadings, I think these large claims can be made for the importance of pleadings at the present day.

Pleadings, after all, are a part, though a very important part, of procedure, and the relation of procedure to the work of justice, in the celebrated words of Sir Richard Henn Collins M.R.,[62] "is intended to be that of handmaid rather than mistress."

---

[60] R.S.C., Ord. 31, r. 24.

[61] *History of English Law*, Vol. IX (1926), pp. 330–331.

Properly used, pleadings can serve the best interests of the administration of justice, which is after all what concerns all of us.

---

[62] In *Re Coles and Ravenshear* [1907] 1 K.B. 1, at p. 4.

REVISION OF THE LAW RELATING TO MENTAL HEALTH

B. Hargrove

The Mental Health Act, 1959, is an attempt to make a fresh start in a sphere of the law which had come to be regarded as a jungle of technicalities and procedural pitfalls. The Act follows the Report of the Royal Commission on the law relating to mental illness and mental deficiency,[1] which was issued in 1957, and to a large extent implements its recommendations. Although the Act will only come into force, in whole or in part, upon the direction of the Minister,[2] for the purposes of this survey the whole Act is regarded as a restatement of the law and no distinction is made between those parts which are in force and those still awaiting the Minister's consent. The Act wipes clean the statutory slate regarding the categories of mental disorder, the administrative methods of dealing with them and the bodies responsible for providing care and treatment. The new legislation endeavours to establish a skeleton code and, perhaps unfortunately, leaves a considerable area to be covered by rules to be made under enabling sections.

The Need for Reform

There are many reasons for the radical form of the 1959 Act. The piecemeal additions to existing legislation over the last hundred years had produced cumbersome machinery which was lacking in both logical form and efficiency. An instance of this can be seen from the fact that no fewer than sixteen statutory procedures existed whereby a person could be detained as suffering from some form of mental disorder[3]; many of these overlapped and some, as in the case of inquisition proceedings,[4] had virtually ceased to be used in practice. But the existing procedures, even if they were satisfactory when first introduced, had long become outmoded by the progress made in the field of psychiatric treatment.[5] The emphasis has now changed from "locking up madmen in madhouses" to "treating the mental illness of patients informally admitted to hospital."

---

[1] Cmnd. 169 (1957). It should be pointed out that it has taken from 1946, when revision was a matter of urgency, until 1959 for this measure of reform to reach the Statute Book. When a Royal Commission has taken three years to make its report, has cost £26,000 and has only sat for fifty and a half days in all, it would seem that a more speedy method of initiating law reform is needed.

[2] Mental Health Act, 1959, s. 153.

It was also considered that further assistance should be given to the progressive outlook which had developed in the public view of mental illness. Members of the public, according to the Royal Commission, were coming to regard the mentally ill patient as no more to be shunned than those suffering from physical illness.[6] How far this is an accurate statement of the layman's view of mental illness is open to doubt, and even the 1957 Report admits that a great deal of prejudice and ignorance still exist concerning anyone who can be described as "mental." However, assuming that the climate of opinion is favourable, the therapeutic advances have reduced the need for the custodial element in mental treatment. Accordingly, a great number of patients could be treated either in their own homes or as out-patients. This would only be effective if the patient will be accepted into the community.[7] One of the results of the new legislation will be that a number of persons who are at present certified will cease to fall into the category of detainees and will either remain in hospital as informal patients or will be released into the community. The factor which does not seem to have received enough attention is that many of those who will find themselves transplanted into everyday life will be compelled to find occupations amongst the lower intelligence strata where toleration of mental illness has never been high.

---

[3] See *Report of the Royal Commission on the Law relating to Mental Illness and Mental Deficiency 1954–57* (Cmnd. 169—1957) (hereinafter referred to as the "*1957 Report*"), Appendix II.

[4] Lunacy Act, 1890, s. 12.

[5] The *1957 Report*, para. 224. *Report of the Ministry of Health 1958* (Cmnd. 806—1959), p. 22.

[6] The *1957 Report*, para. 67. See also "The Public and The Mental Health Bill," by K. Robinson, M.P., XVIII (No. 1) *Mental Health* (1958), p. 6.

[7] *Report of the Ministry of Health 1958* (Cmnd. 806—1959), p. 24.

Perhaps one of the most important reasons for revision of the existing system was that, implicit in the many Acts and regulations, were theories of treatment and prognosis which were long out of date, and even the basic categories of mentally disordered persons under those Acts required reorientation and extention. Nowhere was this need greater than in the sphere of terminology.

THE OLD TERMINOLOGY

In order to appreciate the new terms and definitions and the revolutionary nature of the changes, it is necessary to look briefly at the existing categories at the time of the 1957 Report.

There was a rigid demarcation between *Mental Deficiency* and *Mental Illness*. "Mental deficiency" indicated a condition of arrested or incomplete development of the mind existing before the age of eighteen years, whether arising from inherent causes or induced by disease or injury.[8] Where the mental damage occurred after the age of eighteen the patient might be termed "*mentally ill*." Medically, there is no justification for dividing one type from the other but certain administrative advantages did exist at one time.

The mentally defectives were divided into four groupings:

Idiots, whose defect was so great that they could not guard themselves against common physical dangers. In other words, for their own good they needed almost constant supervision and control.

Imbeciles, where the defect, though less than in the case of the idiots, yet rendered them incapable of managing themselves or their affairs, or, if children, they could not be educated to do so.

Feeble-minded persons constituted one of the most difficult groups, for while the defect did not amount to imbecility, nevertheless it was so pronounced as to require care, supervision and control for their own protection or the protection of others. Where children came within this definition the defect had to be such as to render them incapable of receiving education at a normal school. The degrees of intelligence which are contained in this definition must be immense, encompassing both the near-imbecile and the very dull high-grade mental defectives who work happily and well in the community.

---

[8] Mental Deficiency Act, 1913, as amended, s. 1. It will be noticed that the form of words used by the Act bears a close similarity to those which define "Diminished Responsibility" under s. 2 of the Homicide Act, 1957. This, in turn, may account for the "near insanity" interpretation of the latter section by the courts.

Moral defectives constituted the final group, where the mental defect was allied to a strongly vicious or criminal tendency requiring care, supervision and control of the patient for the protection of others. This category was often of little use in practice because of the dislike of certifying persons whose intelligence might be very near to normal. The difficulty was overcome in some cases by regarding the vicious behaviour as a symptom of some other types of defect.[9]

In dealing with patients described as mentally ill there seems to be no adequate definition. Nor does the confusion of this category with the overlapping group known as " persons of unsound mind " assist.[10] A person of unsound mind is defined by the Lunacy Act, 1890, as " an idiot or person of unsound mind." In other words, there is no satisfactory definition. And while all types of mental defect could, on the broadest interpretation, be regarded as making a patient of unsound mind, in practice the term was limited to those whose defect was one of intelligence and not to cases of moral insanity such as the aggressive psychopath.[11] The effect of the division between mental illness and mental deficiency was that separate hospitals existed for each class, while in some cases the resulting disorders may be very closely allied.

THE NEW TERMINOLOGY

The new definitions provide for four main classes of persons coming within the omnibus term " mentally disordered "; three of them must be examined in some detail, namely, *severe subnormality*,[12]

---

[9] The *1957 Report*, para. 181.

[10] For an example of this type of confusion, see F. B. Matthews, *The Mental Health Service* (1954), p. 9.

[11] The *1957 Report*, para. 158.

[12] Mental Health Act, 1959, s. 4 (2).

subnormality [13] and *psychopathic disorder.*[14] Also included in the term "mental disorder" are mental illness and any other disorder or disability of the mind. These latter terms are not defined but the total effect is to widen the whole field of application of the law of mental health far beyond the bounds it previously occupied and to include the elderly and senile.[15]

Severe subnormality approximates to idiocy under the previous Acts, being defined as a state of arrested or incomplete development of mind, which includes subnormality of intelligence, and is of such a nature or degree that the patient is incapable of leading an independent life or of guarding himself against serious exploitation.[16] Probably in practice a slightly larger group will be included as severely subnormal than that which fell within the classification of idiots. The question of serious exploitation will probably account for this, since it was not normally a "physical danger" within the meaning of the old definition. An attempt is clearly being made to break away from the diagnosis of mental disorder using intelligence as the main test, and the patient's personality as a complete entity is the object of scrutiny. This welcome move, which becomes clearer in the case of psychopathic disorder, discussed below, takes a more realistic attitude towards the problem than that of previous legislation.

For reasons which are not apparent it was decided not to follow the Royal Commission's recommendation and a new category, described simply as "*subnormal*" has been included. Here the subnormality, though of a lesser extent, is of a nature or degree which requires or is susceptible to medical treatment or other special care or training.[17] The danger is that "subnormality" may be used as a dumping-ground for the near-normal person who exhibits inadequate social behaviour and that there will not be any clearly formulated programme of treatment.[18] It may be that subnormality will be applied to the feeble-minded psychopath but it is as yet too early to be sure of this.

---

[13] *Ibid.* s. 4 (3).

[14] *Ibid.* s. 4 (4).

[15] The *1957 Report*, para. 189. *Cf.* 100 *Journal of Mental Science* (1954), pp. 1016–1020.

[16] Mental Health Act, 1959, s. 4 (2).

[17] *Ibid.* s. 4 (3).

[18] "The New Bill and the Mental Deficiency Services," by D. H. H. Thomas, XVIII (No. 1) *Mental Health* (1958), p. 15.

Before dealing with the major problem of the psychopath it is instructive to compare the old and new terminologies. The Royal Commission's objection to terms such as "idiot," "imbecile" or "of unsound mind" was that they had become terms of abuse and ridicule.[19] It seems hardly possible that anyone would be less insulted by being referred to as "severely subnormal" than as an idiot. With an equally serviceable expression such as "mentally handicapped" to hand, it seems unfortunate to choose an expression which is so dangerously close to "sub-human."

The Psychopath

The lacuna in the previous legislation was that where a person's mental disability showed itself only in his anti-social conduct and not in lack of intelligence he frequently could not be detained as a person of unsound mind, and the only way in which he could be compulsorily treated was when that conduct brought the psychopath into collision with the criminal law,[20] when it might be too late. Obviously, some psychopaths were certified and treated under the old procedures but often it was a case of trying to persuade a psychopath that he should enter hospital as a voluntary patient. The difficulty is that the aggressive psychopath, who feels neither pity nor shame, never considers himself as being ill or in need of treatment.[21] Completely egocentric, he is unable to consider, in proportion, the community or the effect of his behaviour on others and accordingly he can see no cause for treatment. He, therefore, was either most unlikely to enter hospital for voluntary treatment, and if he were admitted usually proved to be a most unsatisfactory patient, frequently upsetting the ward and discharging himself before completing his treatment.[22]

---

[19] The *1957 Report*, para. 181.

[20] The *1957 Report*, para. 180; 100 *Journal of Mental Science* (1954), p. 1011.

[21] "The Mental Health Bill and the Psychopath," by Dr. Maxwell Jones, XVIII (No. 1) *Mental Health* (1958), p. 11.

[22] "Why Admit to a Mental Hospital?" by Dr. I. Atkin, *Brit.Med.Jo.* (January 31, 1959), p. 293, at p. 295.

Psychopathic disorder under the 1959 Act is defined as:

> "a persistent disorder or disability of mind (whether or not including subnormality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the patient, and requires or is susceptible to medical treatment."[23]

It must be admitted at once, that it is beyond the wit of man to devise a definition which would encompass all the various states of mind and types of behaviour which have been covered by the term "psychopath." Indeed, the expression has been described as "a waste paper basket category for the chronically unadjusted, an easy explanation of crime through attaching a label which explains nothing."[24] Some idea of the variations which can occur may be collected from the Royal Commission's Report, where nine different descriptions of psychopathic and feeble-minded persons appear in one paragraph.[25] One view is that "psychopath" should only be applied to the aggressives while another includes both the aggressives and the irresponsibles. Accordingly, in criticising the definitions, it must be borne in mind that there is no complete answer.

CRITICISMS

(a) The major criticism is that the Act has not put into force the recommendations of the Commission relating to the definition of a psychopathic state. The description of "a disorder or disability of *mind*" was inserted at the report stage to the exclusion of the definition of "a disorder of personality." This may well lessen the effectiveness of the definition, if one has to discover first a disorder of the mind before a diagnosis under this section can be made. Moreover, it is not a definition which is usually accepted by the medical profession and the definition is in such general terms that there is a danger that the section will not be utilised unless the patient's condition falls within the doctor's own view of what is a psychopathic state.

---

[23] Mental Health Act, 1959, s. 4 (4).

[24] D. R. Taft, *Criminology* (1956), p. 128.

[25] The *1957 Report*, para. 169.

(b) The use of the term " persistent " will cause some difficulty. A psychopath, particularly when under observation, is capable of concealing his anti-social and anti-moral tendencies for long periods of time amounting perhaps to weeks or months.[26] In such circumstances it is difficult to see how conduct which occurs at fairly infrequent intervals and which may be the only outward evidence, can give rise to a diagnosis of a " persistent " disorder of the mind. It is assumed that conduct here will include both omissions as well as acts, this being an important aspect of diagnosis when dealing with the irresponsible psychopath.

(c) One characteristic of the psychopath is that the disorder indicates a mental state where there is immaturity of emotional attitudes, values and behaviour; that is, qualities characteristic in themselves of childhood and adolescence. Consequently, the term psychopath can have little clinical significance in the case of children.[27] There is no provision in the Act to deal with this case of the child, though it may be argued that the normally aggressive or irresponsible child's conduct does not stem from a disorder. Nevertheless, greater precision in drafting could have been used here.

(d) Implied in the definition is the concept of normality. It is difficult to describe what is normal without introducing moral evaluations of one's own. For instance, the verminous wanderer would be regarded as abnormal because the speaker's standards do not accept either a nomadic life or vermin as components in decent conduct.[28] This becomes important when the irresponsible psychopath is in question. Sometimes they form a most artistic group and to " cure " them might in itself ruin those artistic talents. Some would be prepared to allow the irresponsible psychopath a great deal more scope rather than lose the work of artists such as Cellini, Francis Thompson, Oscar Wilde and Mussorgsky. Moreover, even if no great artistic talent is at stake, it is a serious moral problem, and one which receives too little attention, to decide how far a person should be deprived of his liberty and his own brand of perhaps irresponsible happiness in order to save the community from the effects of his non-criminal behaviour.

---

[26] " The ' New Look ' in the Care of the Mentally Ill," by Dr. S. W. Hardwick, XVIII (No. 1) *Mental Health* (1958), p. 10.

[27] K. Cameron, " The Mental Health Bill," *Brit.Med.Jo.* (March 14, 1959), p. 716. See also E. Glover, *Psychoanalysis* (1956), p. 279.

[28] For an extension of this view, see Edgar S. Myers, " The Royal Commission and the Psychopath," IV (No. 4) *Brit.Jo. of Psychiatric Social Work* (1950), p. 28.

(e) Even if a psychopath is the subject of an application for treatment the hospital may still object to admit him since the Act leaves a discretion to refuse.[29] The possibility of this occurring, under the present broad definition, is not as remote as might be supposed.[30] For it has been said that neither an ordinary hospital nor a prison was a suitable place for a psychopath.[31] The case is put even more strongly by Dr. Atkin[32]:

> "The modern mental hospital with its open doors, minimal regulations and absence of authoritarianism cannot enforce any sort of discipline on the psychopath. If he refuses to get out of bed, fails to attend the occupational therapy centre, goes off loafing to the nearest town, returns intoxicated in the early hours of the morning, indulges in sexual intercourse with the female patients, steals from other patients' lockers and so forth, the best we can do is to discharge him and blacklist his readmission."

This raises the problem of the setting up of the special separate hospitals mentioned in the Act[33] where treatment in conditions of maximum security will be provided. Such centres, in the case of those dealt with by the criminal courts, have been advocated for twenty years in the case of the East-Hubert Institute[34] and in the Report of the Home Office Advisory Committee on the Treatment of Offenders.[35] Yet from the 1959 Report of the Prison Commissioners it seems that the psychiatric centre at Grendon Underwood

---

[29] Para. 36 of the *1957 Report* deals with this aspect.

[30] "The Mental Health Bill and the Psychopath," by Dr. Maxwell Jones, XVIII (No. 1) *Mental Health* (1958), p. 13; also IV (No. 4) *The Brit.Jo. of Psychiatric Social Work* (1950), p. 33.

[31] W. L. Neustatter, *Psychological Disorder and Crime* (1953), pp. 98–100.

[32] "Why Admit to a Mental Hospital?" *loc. cit.* in note 22 above, at p. 295.

[33] ss. 97–99.

[34] Sir Norwood East and H. W. de B. Hubert, *Psychological Treatment of Crime* (1939), p. 154.

[35] See also Sir Lionel Fox, *The English Prison and Borstal System* (1952), p. 245.

(which it is believed will be the East-Hubert Institute) is still in the design stage.

(f) The uncertainty of the definition gives rise to justifiable fears, not only as to the type of person who will be affected, but also as to the type of treatment they will receive, since the knowledge of effective methods of treatment is still confined to a narrow plane. For example, it is well known that the completely homosexual psychopath is a hopeless proposition for any of the known methods of treatment [36] and it is not reassuring to find the Royal Commission admitting that the methods of treatment are still at a very early stage of development and little is yet known about the real nature of the disorders or the type of treatment to which the patients may best respond.[37] Moreover, a tendency has arisen, particularly with regard to mentally disturbed persons under sentence in prison, of regarding them as " good research material." Great care must be taken with this dangerous attitude. Most would agree that there is little validity to be attached to the agreement of any mentally disturbed prisoner to act as a " guinea-pig "—too little freedom rests with him to refuse normally. Yet one finds, with some surprise, that experiments with drugs are already being carried out on prisoners who have given such consent.[38]

COMPULSORY POWERS

While the theme of the 1957 Report was the provision of facilities for voluntary treatment and informal admissions to hospital, the new Act is nevertheless amply equipped to apply compulsion where required. Compulsory powers are of two classes, those relating to normal compulsory admission,[39] and those dealing with compulsory detention following court proceedings.[40]

---

[36] Neustatter, *Psychological Disorder and Crime*, p. 151; *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd. 247—1957), para. 197.

[37] The *1957 Report*, para. 179.

[38] *Report of the Commissioner of Prisons 1958* (Cmnd. 825—1959), p. 140, where sixteen out of twenty-four prisoners consented to such an experiment. The *Report* expresses the intention of increasing the number of such experiments.

[39] Mental Health Act, 1959, ss. 25–29.

[40] *Ibid.* ss. 60–80.

ORDINARY COMPULSORY ADMISSION

Even apart from the removal of the certification procedures and the terms related thereto, a real change of principle can be seen in these procedures. Previously a patient not only had to be mentally ill or mentally deficient before he could be certified, he also had to fall into the category of not being under proper care and control or wandering at large and a proper person to be detained in the case of mental illness.[41] Similarly, a mentally deficient patient had to be "subject to be dealt with"[42] before he could be detained. Accordingly, a number of persons who were clearly mentally disordered could not receive treatment, since they did not come within one of the statutory provisions. The new Act is based upon the principle that, not only should the social position be taken into account when using compulsory powers, but whether it is necessary for the patient's own welfare[43] judged by medical standards for him to be detained. The main procedures under the Act are admission for *observation*, for *treatment*, reception into *guardianship* and the emergency procedures.

ADMISSION FOR OBSERVATION

An application for admission for observation may be made either by a mental welfare officer or by the nearest relative founded upon two medical recommendations.[44] These must state that the patient ought to be detained in hospital for a limited period under observation, in the interests of his own health or safety, or with a view to the protection of other persons, and that he is suffering from mental disorder of a nature or degree which warrants such detention.[45] The whole range of mentally disordered persons is within this section. Once detained there is no method of appeal provided, either for the relatives or the patient. While detained, the patient can be treated but no limits are put to the type of treatment.[46] Thus for twenty-eight days a person suffering from quite a mild mental disorder may find himself deprived of his liberty. Provisions under previous legislation required the intervention of the judicial authority[47] before a person could be detained against his will, but no such requirement now exists. There may be cases where it is impossible to diagnose mental disorder without observation, yet the medical recommendation for that observation must be able to state that the person *is* at present suffering from a mental disorder having particular characteristics.

---

[41] Lunacy Act, 1890, ss. 14 and 16.

[42] Mental Deficiency Act, 1913, s. 2; generally this meant that the defective could be detained, on request by a parent, if found neglected, abandoned or cruelly treated, if guilty of a criminal offence, when detained in prison, if an habitual drunkard or incapable of receiving education at a school.

[43] The *1957 Report*, para. 325.

[44] Mental Health Act, 1959, s. 27 (1).

[45] *Ibid*. s. 26.

As mentioned above, the normal period of detention for observation before release will be twenty-eight days, but this can be extended where the nearest relative unreasonably objects to the making of an application for admission for treatment, or a guardianship application, or is likely to discharge the patient without due regard for the welfare of the patient or the interests of the public.[48] Under those circumstances the mental welfare officer[49] may apply to the county court for an order transferring the powers to another person. Until such an application is finally disposed of,[50] the period of detention is continued. How long this will be may depend on the county court list, which is hardly a desirable factor.

One might have thought that twenty-eight days would be sufficient merely for observation, but already this is being criticised in some medical quarters as being too short a period.[51] While after twenty-eight days the patient will be released (unless subject to one of the other procedures, or to an extension of time), there is no guidance upon the question whether the patient can be detained again after a short interval.

---

[46] Quite drastic results could occur where shock therapy is given, including damage to the memory.

[47] Lunacy Act, 1890, ss. 20 and 21. The provisions relating to temporary patients (where no judicial authority was needed) required that the patient should be incapable of expressing his willingness or otherwise: Mental Treatment Act, 1930, s. 5.

[48] s. 52 (3).

[49] Others may also make application but it seems fair to assume that the task will normally fall on the Mental Welfare officer.

[50] Presumably this includes any period for appeals.

[51] "The 'New Look' in the Care of the Mentally Ill," by Dr. S. W. Hardwick, XVIII (No. 1) *Mental Health* (1958), p. 11.

As recently as 1956, Lord Goddard stated in the *Rutty* case,[52] where a high-grade defective had been illegally detained:

> " While, no doubt, what was done in this case was thought and intended to be for the benefit of the girl, persons of whatever age are not to be deprived of their liberty and confined in institutions because doctors and officials think it would be good for them."

The new observation provisions of the 1959 Act operate upon precisely the contrary view to that expressed by Lord Goddard. The section is too wide, supplies insufficient safeguards and should never have been passed into law in its present form.

Admission for Treatment or Reception into Guardianship

These two procedures are provided in cases where prolonged detention or supervision is needed.[53] They apply to two classes of patient, severely subnormal or mentally ill persons of any age, on the one hand, and subnormal or psychopathic patients under twenty-one years of age, on the other. Two medical recommendations must be given stating that it is necessary in the interests of the patient (or the patient's health or safety in the case of treatment), or for the protection of others that he should be detained or received into guardianship, and that his mental disorder is of a nature or degree which warrants the step being taken. Detention will be for periods of one year at a time for the first two years and two years at a time thereafter.[54] Upon reaching twenty-five, in the case of subnormal or psychopathic patients, they must be released, unless a barring certificate is given by the responsible medical officer stating that the patient is likely to act in a dangerous manner to others or to himself.[55] There is no clear guide in the Act as to what " warrants " the reception or detention, nor is the expression " mentally ill " limited. These provisions relate to a much wider group than that previously liable to detention and, accordingly, one would expect that considerable safeguards would have been provided.

---

[52] *R.* v. *The Board of Control, ex p. Rutty* [1956] 2 Q.B. 106.

[53] The Mental Health Act, 1959, s. 26 (treatment), s. 33 (guardianship).

[54] *Ibid.* s. 43.

[55] *Ibid.* s. 44.

THE MENTAL HEALTH REVIEW TRIBUNALS AND OTHER SAFEGUARDS

The first safeguard, apart from the need for medical recommendations, is the power of the nearest relative to object to the making of a guardianship or treatment application[56] prior to the detention of the patient, and the right to discharge afterwards. There is no similar power in the case of admission for observation and, in any event, if the powers are being used unreasonably or indiscriminately, the county court can deprive the relative of them.[57]

Under the previous legislation a number of the most used procedures for detention required the prior consent of a judicial authority who was normally a Justice of the Peace. This function has been replaced by the Mental Health Review Tribunals.[58] Composed of legal, medical and lay members,[59] their duties are to deal with applications made by patients and, under some sections, the relatives of patients. This means that there is no automatic review of any case by the Tribunal and the initiative must come either from the relative, who may not wish the patient to be set at large for non-medical reasons, or from the patient who is probably in the worst position to make the application.[60] Moreover, the number of applications which can be made during a period of detention is severely limited.[61]

The actual form of the review so far as it appears from the Act[62] and the 1957 Report is not encouraging. The Tribunal does not consider whether the original detention was justified, merely whether continued detention is proper having regard to the patient's state at the date of the application.[63] There is little real similarity to a judicial inquiry since rules can be made whereby the Tribunal can refuse a formal hearing[64] and, in the interests of the patient or *for other special reasons*, the Tribunal can refuse to provide copies or a sight of documents upon which they are deciding the case.[65] This refusal applies, not only in respect of the patient, but also regarding the relative. In the same way even the reasons for the decision may be withheld.[66] While it may be that the full rigour of a judicial inquiry is not appropriate to such proceedings, it is to be hoped that the Rules of Natural Justice will not be so totally disregarded, as seems probable from the present form of the Act, since nothing could be worse for all concerned than a tribunal which does not disclose the evidence and then refuses to provide the reasons for its decisions. Nor does the present degree of success of similar tribunals or the conduct and calibre of the appointees give any grounds for undue optimism.

---

[56] *Ibid.* s. 27.

[57] *Ibid.* s. 52. It seems a little curious that in order to deprive the nearest relative of his powers there must be a *prior* judicial inquiry but in order to deprive the patient of his liberty no such inquiry is needed.

[58] *Ibid.* s. 3.

[59] *Ibid.* Sched. I, para. 1.

[60] Cecil Binney deals admirably with the problem of a mentally disordered person starting proceedings in *Crime and Abnormality* (1949), at p. 110.

[61] Mental Health Act, 1959, s. 122 (2).

[62] The full position will only be known when the Rules governing the Tribunal are made.

EMERGENCY APPLICATIONS

These applications, whereby a person may be detained for a period of up to seventy-two hours,[67] differ from the previous statutory procedure in that the duly authorised officer has power to act without a medical recommendation. Under the new procedure such a recommendation is obligatory. This will mean an added burden upon the general medical practitioner and the swift and ever-available service previously provided by the D.A.O. will possibly become less effective.

MENTALLY DISORDERED PERSONS BEFORE THE CRIMINAL COURTS

Two major alterations are included in the 1959 Act.[68] The courts now have power to deal with convicted persons whose mental defects lie within the broader range of psychopathic states.[69] The procedure under section 30 of the Magistrates' Courts Act, 1952, is re-enacted, substituting mental illness and severe subnormality for the requirement that the accused must be of unsound mind. In each case the court can make hospital orders or order reception into guardianship. Such orders can only be made upon the evidence of two medical practitioners. The provisions of Part V of the 1959 Act afford the only way in which a psychopath over the age of twenty-five can be detained, unless he is already in hospital or is suffering from some other mental disorder. For this reason it may be that the prosecution and conviction of psychopaths will become more common, following the encouragement of the Royal Commission[70] that authorities shall not be reluctant to bring a charge against a psychopath since it might be the only way of ensuring that the accused received needed mental treatment.

---

[63] The *1957 Report*, para. 445.

[64] Mental Health Act, 1959, s. 124 (*d*).

[65] *Ibid.* s. 124 (*h*).

[66] *Ibid.* s. 124 (1) (i).

[67] *Ibid.* s. 29.

[68] It is unfortunate that questions relating to Broadmoor patients were excluded from the Royal Commission's terms; a further Royal Commission has recently been appointed to deal with these problems.

Where a court of assize or quarter sessions makes a hospital order it may be coupled with an order restricting discharge, either indefinitely or for a limited period, after the court has had regard to the nature of the offence, risk of further offences and the necessity for protecting the public.[71] This innovation is suspect. It may result in a prisoner being detained in hospital long after the need for treatment has passed. It reduces hospital authorities to the position of gaoler and demands maximum security. Further, it confuses the question of treatment with the problem of punishment and while these two may sometimes coincide, it is not always so. The making of restriction orders may occur following quite trivial offences, since the magistrates' courts are empowered to send the accused to assizes and quarter sessions for the making of such an order,[72] just as committals for sentence may occur where the magistrate considers that his powers are not adequate to deal with the punishment required. Where a prisoner is subject to a hospital order with restriction it may have a most adverse effect if he is detained after recovery in hospital, in contact with other prisoner patients and is yet deprived of his right to appeal to a Mental Health Review Tribunal.

---

[69] Mental Health Act, 1959, s. 60 (1).

[70] The *1957 Report*, para. 34.

[71] Mental Health Act, 1959, s. 65 (1).

[72] *Ibid*. s. 67.

The number of persons dealt with on conviction by similar methods under existing legislation in previous years has been small. In all courts only 350 persons in 1956, 368 in 1957 and 380 in 1958 [73] were dealt with as being in need of mental care. Yet the number of cases where there has been a remand for a mental report has increased from 5,190 in 1948 to 5,832 in 1958,[74] and it is admitted [75] by the Prison Commissioners that the load is too great for the facilities and staff at their command. The added work which the new Act will bring may cause a breakdown unless substantial expansion of these services occurs.

A NEW PHILOSOPHY IN PENOLOGY?

The courts will be dealing under the new Act with persons whose only indication of mental disability will be their anti-social behaviour in the case of the psychopath. While the Royal Commission has hastened to point out that, in law, such persons are responsible and will sometimes only receive treatment on a conviction, the fact remains that by reason of their anti-social nature and behaviour the psychopaths receive allegedly " treatment " rather than punishment. The " non-psychopathic criminal " will receive punishment even though his behaviour may have been less heinous. Unless one can see a clear-cut distinction between the psychopathic criminal and his " non-psychopathic " colleague (and it is submitted that no clear line is apparent from existing legislation), then in the confusion the reformative theory of punishment may overshadow the deterrent theory, producing danger for the public. It may not only be more economically sound, from the criminal standpoint, to be hanged for a sheep as for a lamb—it may be safer since, the greater the course of anti-social conduct, the nearer the criminal may be to being regarded and treated as a psychopath.

One of the main concepts of punishment has rested in the past on the theory that a criminal is responsible for his acts and (insanity apart) must be deterred from his crimes. The Homicide Act, 1957, introduced the case of diminished responsibility where, owing to abnormality of the mind, the accused is guilty of a lesser offence and liable to be *punished for that lesser offence*. The new statute goes on one stage further and the psychopath is guilty of the offence but, by reason of his mental state, *is to be treated* with or without restriction under a hospital order. When it is considered that both criminality and a psychopathic state may emerge from, and be primarily caused by, environmental factors it is questionable how long the doctrine of absolute responsibility for conduct can continue to be accepted in criminal law.

---

[73] *Criminal Statistics for England and Wales 1956* (Cmnd. 286—1957), *1957* (Cmnd. 599—1958) and *1958* (Cmnd. 804—1959).

[74] *Report of the Commissioners for Prisons for the Year 1958* (Cmnd. 829—1959), p. 100.

[75] *Ibid.* p. 101.

THE VOLUNTARY PATIENT

Previously, voluntary patients were admitted under the Mental Treatment Act, 1930,[76] and there has been a growing transition from the custodial attitude to the acceptance of voluntary patients as a normal method of treatment.[77] The encouragement of this trend is vital to the success of the new legislation, yet such patients are mentioned in only one section of the 1959 Act,[78] the intention being that there shall be no differentiation between informally admitted patients, whether mentally or physically ill.

The new Act does not retain the seventy-two-hour period of notice which was previously required before a voluntary patient could discharge himself from hospital. At the same time it is unnecessary for the patient to be able to express his willingness to enter the hospital, for there is no need for the patient to sign any application form.[79] These provisions are not without their dangers. The patient who enters hospital mute and unresisting may later allege that he was never a voluntary patient at all, that a conspiracy between doctors and relatives kept him in hospital. Since informal admission is outside the terms of the Act, there cannot be any protection afforded to a doctor by the exemptions section [80] which only deals with acts done in pursuance of the statute. In this respect doctors may be less well protected than previously. Many persons who entered hospital under the pre-1959 law as voluntary patients on expressing a wish to leave were persuaded, during the seventy-two-hour waiting period, to remain. The loss of that period places the hospital at a disadvantage and the officially recommended threat to use compulsory procedures may produce awkward consequences if the patient later alleges false imprisonment.

---

[76] Mental Health Act, 1959, s. 1.

[77] In 1949, only 14·3 of patients in mental hospitals were voluntary patients. By December 1958 the percentage had increased to 44·2. *Report of the Ministry of Health for the Year to 31st December, 1958* (Cmnd. 806—1959), p. 22.

[78] s. 5. The Royal Commission clearly took great notice of the evidence of the Royal Medico-Psychological Society on this point. *Cf.* 100 *Jo. of Mental Science* (1954), pp. 996–997.

[79] s. 5 (1).

A corollary to the use of informal admissions is the growth of out-patient treatment. This will accelerate as the Act comes into full force but, at present, it can be confidently stated that with the staffs and hospitals available a large part of the Act must remain in the realms of speculation for some time. One wonders if it is really fair to patients and relatives to have passed the whole Act at once, leaving it to the Minister's discretion as to when various parts shall come into operation, while hopes are stirred and dashed on a topic which should be handled with the greatest tact.

Any increase in the number of persons suffering from mental disorder at large in the community may have certain adverse results. The community may react against them for any one of a number of reasons. We can expect statistics to be produced showing the increased relation between mental disorder and criminality and we can also foresee a number of quite false conclusions being drawn from such statistics.[81]

What is important, however, is to remember that the Mental Health Act is a valiant attempt at progress in this topic; a topic which affects 140,000 persons [82] who are detained in our mental health institutions, which affects a quarter of a million other patients who are treated for other forms of mental illness. Not just their property, not merely their status is involved, but their future life, liberty, happiness and their relatives' happiness are at stake. This is, in truth, a current legal problem.

---

[80] s. 141.

[81] See D. R. Taft, *Criminology* (1956), p. 123.

[82] *Report of the Ministry of Health 1958* (Cmnd. 806—1959), p. 28.

THE CARRIAGE OF GOODS BY SEA

E. R. Hardy-Ivamy

I. The Carriage of Goods by Sea Act, 1924

One would have imagined that after thirty-five years the law relating to some of the fundamental provisions of the Carriage of Goods by Sea Act, 1924, would have become settled. But the number of problems raised by the wording of the Act is by no means at an end, as it is hoped to show in this paper. The difficulties of interpretation seem likely to continue and perhaps the time is now ripe for another International Conference to be called to consider the operation of the Convention of Brussels of 1924 (on which the Act is based) in the light of experience as is envisaged by Article 16. It is to some of the more recent cases[1] decided in this country, the United States and the Commonwealth that we now turn.

The meaning of "package"

Article IV, rule 5, of the Carriage of Goods by Sea Act, 1924, provides: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100[2] per package or unit unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading." The wording of the United States Carriage of Goods by Sea Act, 1936, is similar except that the words "customary freight unit" are used instead of "unit."[3]

---

[1] Other cases concerning the interpretation of the Act are considered in "Shipping Law Revision," 10 *Current Legal Problems* (1957), at pp. 190–194, and "Bills of Lading," 12 *ibid.* (1959), at pp. 208–218, by the present writer.

[2] The sum of £200 has been substituted by the British Maritime Law Association Agreement of August 1, 1950.

[3] s. 4 (5) of the Act provides: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per

In this country the word "package" used in the Act has not been the subject of judicial decision. But in 1937 in a case concerning the shipment of an unboxed automobile from Norfolk, Virginia, to London, Goddard J. (as he then was) held that a clause in a bill of lading limiting the liability of a shipowner in respect of a "package" was not applicable.[4] He observed[5]: "'Package' must indicate something packed. It is obvious that this clause cannot refer to all cargoes that may be shipped under the bill of lading; for instance, on a shipment of grain it could apply to grain shipped in sacks, but could not in my opinion possibly apply to a shipment in bulk. . . . While I hope I am not giving an unduly narrow construction to the clause, I do not feel that I can hold that a motor-car put on a ship without a box, crate or any form of covering is a package, without doing violence to the English language."

But a number of decisions on this matter have been given in the United States. In *The Bill*[6] the District Court of Maryland noted the suggestion contained in *Temperley and Vaughan*[7] that the term "package or unit" would be inapplicable to the whole of a bulk cargo, but in that case, which concerned a cargo of oil, it was unnecessary to pursue the point because it was agreed that the phrase "per customary freight unit" applied to it.

In one case the United States Court of Appeals, Second Circuit, held that an uncrated locomotive and tender were not "packages."[8] Further, it has been held that sheets of steel stowed in piles were not "packages,"[9] and in another case the term did not cover eleven uncrated tractors.[10]

But suppose that there is no actual box or crate, are there any circumstances in which the cargo might be considered a

customary freight unit." For a discussion of the term "customary freight units," see "'Units' and 'Customary Freight Units' in the Carriage of Goods by Sea," 22 M.L.R. (1959), pp. 550–555, by the present writer.

[4] *Studebaker Distributors, Ltd.* v. *Charlton Steam Shipping Co., Ltd.* [1938] 1 K.B. 459.

[5] At p. 467.

[6] (1944) 55 F.Supp. 780.

[7] *The Carriage of Goods by Sea Act, 1924* (4th ed., 1932), p. 81.

[8] *Isbrandtsen Co., Inc.* v. *United States* (1953) 201 F. 2d 281.

[9] *Waterman S.S. Corporation* v. *United States Smelting, Refining & Mining Co.* (1946) 155 F. 2d 687 (Circuit Court of Appeals, Fifth Circuit).

[10] *Middle East Agency* v. *The John B. Waterman* (1949) 86 F.Supp. 487 (United States District Court, Southern District of New York).

"package"? In *Middle East Agency* v. *The John B. Waterman* [11] a rock-crusher had been "knocked down" for shipment. Among the parts shipped were some pieces of machinery attached to skids [12] to facilitate handling. These were held to be "packages."

But that this will not always be so is shown by the latest case in 1959—*Gulf Italia Co.* v. *American Export Lines, Inc.*[13] There a tractor was prepared for shipment by putting waterproof papering over some of its parts and by partially encasing the superstructure with wooden planking. The tread portions of the tractor were uncovered and it was described as "semi-boxed." The United States Court of Appeals, Second Circuit, held that it was not a "package." Circuit Judge Swan said that it was contended by the shipowner that any preparation of goods for ocean transportation converted the goods into a package. Such a construction of the section would cause a shipper, who attempted to minimise possible harm to his property by putting protective covering on sensitive parts, to be placed in a worse position than a shipper who made no effort to reduce the possibility of loss from inclement weather or pilferage. The learned judge agreed with the court below [14] in concluding that "such result would hardly foster good commercial practices." [15] Any test dependent upon extent of external covering would lead to uncertainty and increase litigation.

But can the parties define what they mean by the term "package" for the purposes of the Act? In *The Margaret Lykes* [16] in 1944, the parties had agreed that an unboxed motor-truck should be regarded as a "package," and this was upheld by the court. But in 1949 in *Middle East Agency, Inc.* v. *The John B. Waterman* [17] the court said that it would not hold that the use of the printed word "package" in a bill of lading would not make an uncrated tractor a package in fact, and that any attempt by a carrier to modify the limitation provisions of the Act should be carefully scrutinised. This principle has been applied in 1958 in *Gulf Italia Company* v. *The Exiria.*[18] "To allow the parties themselves to define what a 'package' is would allow a lessening of liability other than by the terms of the Act, since a carrier could always limit its liability to $500 by merely extracting a stipulation from the shipper that everything shipped in no matter what form would be deemed for the purposes of limitation of liability a 'package.'"[19]

---

[11] See above, note 10.

[12] A "skid" generally consists of several long parallel pieces of heavy timber with transverse pieces to hold them in position.

[13] (1959) 263 F. 2d 135.

[14] (1958) 160 F.Supp. 956.

[15] *Ibid.* at p. 960.

[16] (1944) 57 F.Supp. 466 (District Court for the Western District of Louisiana, Monroe Division).

[17] See above, note 10.

But if the Act does not apply *proprio vigore* and is only incorporated into the bill of lading by reference the parties are entitled to state what they mean by the term "package." Thus, in *Pannell* v. *United States Lines Co.*,[20] where a yacht was carried on deck so that the Act did not apply to it,[21] a clause stating that "the meaning of the word 'package' includes pieces and articles of any description except goods shipped in bulk" was held to be valid, and the craft could be so regarded.

The period of limitation

Article III, rule 6, provides: "In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year[22] after delivery of the goods or the date when the goods should have been delivered."

---

[18] (1958) 160 F.Supp. 956.

[19] At p. 958.

[20] (1959) 263 F. 2d 497.

[21] United States Carriage of Goods by Sea Act, 1936, s. 1 (*c*).

[22] This period may be waived by the carrier. See *J. A. Folger & Co.* v. *United Fruit Co.* (1959) 170 F.Supp. 933; *Leo Hess International Corporation* v. *Isthmian Steamship Co.* (1958) 170 N.Y.S. 2d 705. In the United States the courts have construed "brought" to mean "libel filed": *Ore Steamship Corporation* v. *D/S A/S Hassel* (1943) 137 F. 2d 326 (Circuit Court of Appeals, Second Circuit). Where the United States Carriage of Goods by Sea Act, 1936, was incorporated into a bill of lading where it did not apply *ex proprio vigore*, because the goods had been discharged from the ship, a clause stating that "the suit should not be considered to have been brought within the time specified . . . unless process shall have been actually served and jurisdiction obtained within such time," effect was given to it because the terms of the Act were only a part of the contract and "the specific controls the general." *J. Aron & Co.* v. *The Askvin* (1959) 267 F.Supp. 277 (United States Court of Appeals, Second Circuit). For a case where underwriters had been given no authority by the consignees of damaged cargo to start proceedings, see *Government of Pakistan* v. *The S.S. Ionian Trader* (1959) 173 F.Supp. 29 (District Court for the Southern District of New York).

Normally goods are delivered within a reasonable time after the ship docks, in which case the action for damages must be brought within one year from the date of delivery; or else the goods are never delivered, in which event the action for non-delivery must be commenced within one year of the time that they ought to have been delivered.

But the rule appears to have been badly drafted, for what is the position if the goods are delivered later than the date on which they should have been delivered? No guide is afforded by any English case, but this was one of the issues in the American case of *Leo Hess International Corporation* v. *Isthmian Steamship Company*,[23] where the carrier should have delivered the cargo by March 1951 but did not do so until June 1952. Action was brought in January 1953 and the New York Supreme Court, Appellate Division, held that it was not out of time, for the limitation period began from the date of delivery. It rejected the carrier's argument that the rule meant that the one-year limitation period began from the delivery date or the date on which the goods ought to have been delivered, whichever should occur first. The court said that if this view were adopted, the carrier approaching the end of the non-delivery year had in its power by a further withholding to deprive the holder of the bill of lading of any claim for damages to the goods, even though delivery was made immediately after the expiration of the non-delivery year.

Declaration of value of the goods

The shipper is not entitled to recover more than the amount laid down by the Act, unless the nature and value of the goods have been declared by him before shipment and inserted in the bill of lading.[24] This declaration, if embodied in the bill of lading, is prima facie evidence of the value.[25]

But what is the position if no bill of lading is ever issued? This interesting situation arose in *John Deere & Co.* v. *Mississippi Shipping Co., Inc.*,[26] where a boxed tractor dropped forty feet into a hold whilst being loaded. The shipper had made no attempt to declare its value before shipment as required by the Act, and no bill of lading was ever issued. He asserted that since the limitation could only be avoided by a declaration of value inserted in the bill of lading, and since the bill of lading was not to be issued until after the shipment was loaded, he had no opportunity to exercise that option until that time, and was therefore not bound by the limitation. There is much force in this contention, but the District Court for the Eastern District of Louisiana, New Orleans Division, considered that the words of the section had to be read in the light of section 3 (3), which gave the shipper the right to demand a bill of lading from the carrier at any time after delivery of the goods for shipment. There was nothing to show that the shipper had required the carrier to issue a " Received for Shipment " bill of lading declaring the full value at the time of delivery to the wharf, and accordingly his claim was limited to the amount provided by the Act.

---

[23] See above, note 22.

[24] Carriage of Goods by Sea Act, 1924, Art. IV, r. 5.

[25] *Ibid.*

[26] (1959) 170 F.Supp. 479.

By the words of the Act the burden of inserting the value is clearly on the shipper of the goods. This can be seen from the judgment of the Supreme Court of Canada in *Anticosti Shipping Co.* v. *Viateur St. Amand*,[27] where it was held that the fact that the carrier knew that the value of a truck was well in excess of the limit of $500 did not mean that the shipper was not required to make a declaration if he wished to avoid the limitation provision.

Void clauses

Article III, rule 8, provides: " Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article, or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect."

The number of cases interpreting this provision continues to grow, and possibly to avoid doubt the time has come for further examples of clauses offending against it to be expressly inserted into the Rule. As it is, the Rule merely goes on to state that "a benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability."

---

[27] [1959] S.C.R. 372; [1959] 1 Lloyd's Rep. 352

A recent American decision concerns a "dry docking" clause. In *Levatino* v. *General Steam Navigation Co., Ltd., of Greece*[28] the bill of lading contained a clause stating that "the ship may, whenever the carrier or master deem advisable for matters occurring before during or after loading, known or unknown at the time of loading or commencement of the voyage, either with or without goods on board, and before or after proceeding toward the port of discharge . . . drydock." The District Court for the Southern District of New York held that this provision was a valid one, because it in no way attempted to exempt the carrier from the consequences of negligence, fault or failure to perform any duty owed to the shippers. It might have been felt that going into drydock amounted to a deviation, because it might well vary the risk and delay the transit of the goods, but the court in any event found that the drydocking was a "reasonable deviation" within the meaning of Article IV, rule 4.[29] But circumstances can be imagined when this would not be so.[30] Whether drydocking clauses offend against the Rules should be clearly stated in any new legislation that might be contemplated.

This case concerned the discharge of a cargo of chestnuts, and the court held that a clause providing that "the carrier is not required to deliver said goods at port of discharge or port of destination at any particular time or to meet any particular market, or at any time for any particular use by any particular date or ship" was valid. So also was a further clause stating that "the carrier shall not be liable for any consequential or special damage."

In *Otis McAllister & Co.* v. *Skibs A/S Marie Bakke*[31] the United

---

[28] (1959) 170 F.Supp. 756.

[29] For recent cases on whether a deviation was reasonable, see *Accinanto, Ltd.* v. *A/S J. Ludwig Mowinckels: The Ocean Liberty* [1953] 1 Lloyd's Rep. 38; *Theiss Bros. (Queensland) Pty. Ltd.* v. *Australian Steamships Pty. Ltd.* [1955] 1 Lloyd's Rep. 459.

[30] See further *The Indrapura* (1909) 171 F. 929; (1916) 238 F. 853.

[31] (1958) 260 F. 2d 181, following *American Trading Co.* v. *S.S. Henry Culbreath* (1952) A.M.C. 1170 (District Court for the Southern District of New York) and *Nabob Foods, Ltd.* v. *Cape Corso (Owners)* [1954] 2 Lloyd's Rep. 40 (Exchequer Court of Canada).

States Court of Appeals, Ninth Circuit, held that a clause stating that the value of the cargo " shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value plus freight and insurance if paid, irrespective of whether any other value is greater or less " was void.

In *Transocean Machine Co., Inc.* v. *Oranje Line*[32] the Exchequer Court of Canada held that a clause authorising the carrier " to tranship or land and reship the goods at ports of shipment and transhipment or at any other ports or into any other vessels or crafts for any purposes and to forward to destination by other vessel or craft " was valid. So also was a clause that the carrier was " not to be liable for delay caused by transhipment and prolongation of the voyage."

Before and at the beginning of the voyage

Article III, rule 1, provides that " the carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—(*a*) make the ship seaworthy. . . ." The meaning of these words fell to be decided in *Maxine Footwear Co., Ltd.* v. *Canadian Government Merchant Marine, Ltd.*[33] in 1959, where a cargo was lost when the ship caught fire before she sailed on her voyage. The Judicial Committee of the Privy Council held that the words did not mean that due diligence had to be exercised only at two moments of time, *viz.*, at the beginning of loading and at the beginning of the voyage, but that the obligation was a continuing one and started from at least the beginning of loading. The court was careful not to define the period from which it commenced any further, and it is possible that it might start from an even earlier moment, *e.g.*, from the time of the contract of carriage between the shipper and the carrier.[34] One question which is left unsettled is the effect of the Carriage of Goods by Sea Act, 1924, on the doctrine of " stages " after the vessel has sailed, but it seems implicit in the speech of Lord Somervell[35] that this doctrine has ceased to exist in the case of bills of lading to which the Act applies.[36]

---

[32] [1958] Ex.C.R. 227, where the English case of *Marcelino Gonzalez* v. *Nourse* [1936] 1 K.B. 565, at 574, was applied.

[33] [1959] 3 W.L.R. 232.

[34] *W. Angliss & Co. (Australia) Proprietary Ltd.* v. *Peninsular & Oriental Steam Navigation Co.* [1927] 2 K.B. 456, at 462.

The interpretation of the words "at the beginning of the voyage" has not been the subject of an English case, nor is any definition supplied by the Act. Suppose that a vessel is sailing from London to Australia via a number of ports of call in Africa. Does the voyage start when she leaves London, or is there a new voyage each time she leaves a port at which she loads cargo?

In the recent case of *Zander & Co.* v. *Mississippi Shipping Co.*[37] the United States District Court for the District of Louisiana held that a voyage did not begin in so far as a particular cargo was concerned until the vessel departed from the port at which the particular cargo was lifted and loaded aboard.

II. Charterparties

In recent years although the issues in some charterparties have related to matters of fact, *e.g.*, whether the charterer had nominated a safe port,[38] most of the reported cases have concerned the interpretation of the terms used in the standard forms of charterparties.

Perhaps the reason why the interpretation of charterparties is such a fruitful source of litigation is to be found in a dictum of Scrutton L.J., when he said that they contained phrases "not easy to construe, as is often the case when parties with conflicting interests adopt an ambiguous form which each side dare not make precise, for fear that the other party should disagree with their meaning if stated precisely."[39]

Nevertheless, it might perhaps be to the advantage of the parties if, in the case of some of the terms at present in use in the standard forms, some degree of redrafting could take place because the cost of litigation to get a point settled must often run into thousands of pounds. This can be illustrated by recent experience. In one case in 1958 the hearing took six days in the House of Lords, and had been preceded by a hearing of five days in the Court of Appeal and one of four days in the High Court.[40] In the same year in another case, a hearing of nine days in the High Court was followed by one of five days in the Court of Appeal.[41] In 1959 the longest period spent on a case concerning a charterparty was one of twenty-four days and involved the citation by counsel of nearly one hundred cases.[42]

---

[35] [1959] 3 W.L.R. 232, at 239.

[36] Carriage of Goods by Sea Act, 1924, s. 1.

[37] (1959) 171 F.Supp. 184; affirmed on this point (1959) 270 F. 2d 345.

[38] *Leeds Shipping Co., Ltd.* v. *Société Française Bunge* [1958] 2 Lloyd's Rep. 127 (whether Mogador was a safe port).

[39] *Brightman & Co.* v. *Bunge y Born Limitada Sociedad* [1924] 2 K.B. 619, at 629.

The principal difficulties have concerned the provision of alternative cargoes, sending a vessel to a strike-bound port, and the failure to have a cargo ready.

The provision of alternative cargoes

In 1924 in *Bunge y Born* v. *H. A. Brightman & Co.*[43] one of the issues was the extent of the charterers' duty to provide an alternative cargo if they were prevented from loading the cargo which they had originally chosen to ship. In this case the charterparty contained a clause stating that a cargo of wheat and/or maize and/or rye was to be loaded. After the loading of the wheat had commenced, the Argentine Government prohibited the export of wheat. In giving judgment in the Court of Appeal, Bankes L.J. said that he could not accept the contention of the shipowners which was that " even if the charterers have intended to ship cargo of wheat and have made arrangements to secure the same, which, apart from some unforeseen event, would have enabled them to fulfil their contract, yet if without default on their part the unforeseen event occurs and compels them to substitute maize and/or rye for wheat, they are not to be allowed the necessary time to make up their mind what is best to be done, and to alter their arrangements accordingly, but are bound by the fixed time for loading laid down in the charterparty. I cannot so read the contract. I think that a term must be implied giving the charterers a reasonable interval of time to enable them to deal with the altered conditions."[44] Concurring judgments were given by Scrutton and Atkin L.JJ.[45] The latter observed[46]: "The contract is made in relation to well-known business conditions, and it would be surprising to find that a shipper of cargo, who intended to ship wheat, should find that he had no protection at all in the event of a sudden prohibition imposed while he was in the process of loading wheat, on the ground that the law presumed that he also had ready for that ship a full cargo of maize and rye, and in some cases also linseed and rapeseed." The issue did not arise for decision when the case went to the House of Lords,[47] but Lord Atkinson considered that the charterers were entitled to a reasonable time to determine how to deal with the altered conditions.[48]

---

[40] *Adamastos Shipping Co., Ltd.* v. *Anglo-Saxon Petroleum Co., Ltd.* [1959] A.C. 133.

[41] *Agrimpex Hungarian Trading Co. for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.* [1958] 2 Q.B. 385.

[42] *Reardon Smith Line, Ltd.* v. *Ministry of Agriculture, Fisheries & Food* [1959] 3 W.L.R. 665.

[43] [1924] 2 K.B. 619.

In *South African Dispatch Line* v. *Owners of the Panamanian Steamship Niki*[49] in 1958, Diplock J. held himself bound by the earlier decision of the Court of Appeal and held that where a charterparty provided that the charterers were to load a cargo of "lumber and/or timber and/or wood goods and/or wheat in bulk and/or lawful merchandise," and a strike prevented the loading of lumber, they were still bound to load an alternative cargo, but were to be allowed a reasonable time in which to make their arrangements. He felt that, in considering what was a reasonable time in which to obtain an alternative cargo one must take into consideration that in sending the vessel to a strike-bound port, knowing that the strike was on, it would be reasonable for the charterer to make in advance preliminary arrangements for obtaining a cargo if the strike continued when he got there. There would thus be no great encouragement for charterers to send vessels to strike-bound ports.[50]

In the *South African Dispatch Line's* case[51] the words of the relevant clause said: "if the cargo intended for shipment under this charterparty cannot be provided," and counsel for the charterers said that they had been inserted in order to get rid of the effect of the decision in *Bunge y Born* v. *H. A. Brightman & Co.*[52] The charterers intended to load lumber, and therefore he claimed were entitled to rely on the exceptions clause. Diplock J. refused to accept this argument. He considered that the reason for the clause in its present form could easily be accounted for as being intended to overcome the general rule that excepted perils affecting the provision or transport of the cargo, as opposed to loading, did not come within the ordinary clause concerning events preventing the actual loading itself.[53]

---

[44] At p. 628.

[45] At pp. 631 and 637 respectively.

[46] At p. 637.

[47] [1925] A.C. 799.

[48] At p. 808.

[49] [1959] 1 Q.B. 238.

[50] At p. 253.

[51] See above, note 49.

This decision was affirmed by the Court of Appeal.[54] In giving judgment, Hodson L.J. considered that the charterparty was not converted into a contract of affreightment for a particular commodity by the nomination of that commodity. The right to nominate carried with it the duty to load a full and complete cargo of one of the range, so that, if the charterer could not load the one he had intended to load, prima facie he must load some other cargo.

But in *Reardon Smith Line, Ltd.* v. *Ministry of Agriculture, Fisheries & Food*[55] the relevant clause in the charterparty referred to " the loading of the cargo or intended cargo " being delayed by various causes. Under this charterparty the charterers had to load " wheat in bulk and/or flour in sacks." A strike at the port of loading delayed the loading of wheat which they had arranged to ship. McNair J. said that one interpretation of the words used was that the words " intended cargo " were added merely to cover the extension of the exceptions to the process of supply and bringing down to the port, but in that case the words " the cargo " would not be necessary. He considered that the clause covered two distinct events: (1) delay affecting all kinds of contractual cargo; and (2) delay affecting the intended cargo. If either of those events occurred, laytime was not to count during its continuance. Accordingly, once it was proved that the charterers did intend to load wheat, and that the supply or loading of that intended cargo was delayed by the specific exceptions in the charterparty, no obligation to exercise any of the alternative cargo options was imposed on them.

---

[52] See above, note 43.

[53] See, *e.g.*, *Kay* v. *Field* (1882) 10 Q.B.D. 241; *Grant* v. *Coverdale* (1884) 9 App.Cas. 470.

[54] [1960] 1 All E.R. 285.

[55] See above, note 42.

There is some difference of judicial opinion as to where the burden lies of proving that alternative cargoes could have been shipped and within what time.

In the *South African Dispatch Line* case [56] and the *Reardon Smith Line, Ltd.* case [57] the respective judges both considered that the burden would be on the charterers. On the other hand, in *S.S. Matheos* v. *Louis Dreyfus & Co.*,[58] which concerned an exception of detention by ice, a dictum by Lord Dunedin lends support to the view that the onus is on the shipowners to obtain a finding that it would have been unreasonable for the charterers to do nothing.[59]

Sending a vessel to a strike-bound port

Reardon Smith Line, Ltd. v. *Ministry of Agriculture, Fisheries & Food* [60] also concerned the question whether, in the absence of express terms in a charterparty, a charterer was under a duty to nominate a substitute port after a properly nominated port had become strike-bound. Counsel for the shipowners in that case argued that it had been established in *Brightman & Co.* v. *Bunge y Born* [61] that it was the duty of a charterer, when once a class of contractual cargo became impossible to load, to take steps after a reasonable time to ship another class of contractual cargo not subject to such impossibility, and therefore by analogy it must be his duty to nominate a substitute loading port when the first port became strike-bound, and if no port had been nominated to nominate a port which was not strike-bound.

This argument was not accepted by McNair J., who said that he was not prepared to imply such a term into the charterparty. It seemed to him that there was a striking difference between a switchover from one type of cargo to another which might not involve the movement to another loading berth, and a switchover to another port in the range which would necessarily involve clearance from the port which was being vacated, probably an ocean voyage to a new port, and entry into the new port, all at the expense of the shipowner. If it were said that in the circumstances contemplated the shipowner would readily shoulder those expenses, that, as it seemed to him, was no answer, since if the charterer were under the obligation alleged, he would have the right to switch over even if the shipowner objected.

---

[56] [1959] 1 Q.B. 238, at 252.
[57] [1959] 3 W.L.R. 665, at 708.
[58] [1925] A.C. 654.
[59] At p. 662. But *cf.* the view of Lord Sumner, *ibid.* at p. 665.
[60] See above, note 42.
[61] See above, note 43.

It was further argued that the charterers could not bring themselves within an exceptions clause in the charterparty providing that laytime was not to count " when the loading of the cargo or intended cargo is delayed by strikes," because they had sent the vessel to the port even though they knew it was strike-bound. The learned judge held that there was no settled rule of construction that a specific exception, such as strike or war, could not be relied on if the strike or war were operative at the time when the contract was made or the ship ordered to the affected port. Further, he found difficulty in seeing how knowledge of both or either of the parties could be material unless possibly on the ground that all contracts must be construed in the light of surrounding circumstances. The authorities did not entitle him nor compel him to hold that the word " strikes " must be read as " strikes coming into existence after the date of the charterparty." To do so would be to write into the charterparty words which were not there, and which were not necessarily implied. Accordingly, the charterers could rely on the strike clause, irrespective of their knowledge of the strike, and whether it was already in existence at the date of the contract was of no consequence.

It is interesting to observe that no mention is made in the judgment of two American decisions, in which a strike prevented loading at one of the ports to which a charterer was entitled to send the vessel in question.

In *United States* v. *Coal Cargo of the Franklin County*[62] in

---

[62] (1924) 11 F. 2d 805.

1924, the District Court for the Eastern District of Pennsylvania held that the charterer was under no duty to nominate another port, for there had been no negligence on his part. This decision rests on the assumption that in some circumstances he might be under a duty to make a fresh nomination; for District Judge McKeehan observed[63]: " While I recognise the rule that the mere existence of an excepted cause of delay does not permit a charterer to fold his hands and sit idly by, when, by the exercise of reasonable diligence he might avoid the delay, still, once the existence of an excepted cause is proved, it is incumbent upon [the shipowners] to show affirmatively that the exercise of reasonable diligence on the part of [the charterers] would have avoided it." This decision was later affirmed.[64]

A similar decision was given in 1927 in *United States* v. *Russian Volunteer Fleet*[65] by the District Court for the Southern District of New York, where District Judge Goddard held that the charterers were not obliged to nominate another port, for there had been no negligence on their part nor could they have by reasonable diligence avoided the delay.

Perhaps it would be in the interests of shipowners to have inserted a clause in the standard forms of charterparties to the effect that, if the port is strike-bound when the vessel is, say, seven days steaming away from it, then the charterparty is to be null and void.

Failure to have a cargo ready

In *Ardan Steamship Co., Ltd.* v. *Andrew Weir & Co.*,[66] which concerned a berth charterparty, a vessel had arrived at the port on July 14 to load a cargo of coal, but was not allowed by the dock authority to berth until August 23, when a cargo was ready for her. If it had been ready on July 14, she could have proceeded to her berth at once and so become "an arrived ship." The House of Lords held that the charterers were liable for the delay. Lord Davey said [67]: "By whose default was it that the ship did not get a loading order? The answer in my opinion can only be that it was the default of the [charterers] in not providing the cargo when the ship was ready to go to the berth to receive it. It is said that the [charterers] did nothing unreasonable. Be it so. But through this misfortune (it may be) they have failed to perform their contract with the shipowners. In short, the [charterers] have not satisfied my mind that it was any part of their contract with the [shipowners] that the latter . . . should take the risk of the cargo not being ready."

---

[63] At p. 807.

[64] (1926) 11 F. 2d 809 (Circuit Court of Appeals, Third Circuit): certiorari denied (1926) 273 U.S. 696. See further, *Yone Suzuki* v. *Central Argentine Railway, Ltd.* (1928) 27 F. 2d 795, at 804 (*per* Circuit Judge Augustus N. Hand): " Moreover the strike was in progress at the South Dock from the time those vessels arrived, and the railway should have exercised its option to name a different berth, and should have sent them somewhere else, if the strike would cause a delay. Its neglect ought not to prevent demurrage from running."

[65] (1927) 22 F. 2d 187.

[66] [1905] A.C. 501.

This decision laid down the rule that in the case of a berth charterparty the duty of the charterer to have the cargo ready is an absolute one, but passages in the judgments given in other cases tend to support the view that he is bound only to take reasonable steps to enable the vessel to become "an arrived ship." [68]

Ardan Steamship Co., Ltd. v. *Andrew Weir & Co.*[69] has been applied recently by the Court of Appeal in *Agrimpex Hungarian Trading Company for Agricultural Products* v. *Sociedad Financiera de Bienes Raices S.A.*[70] In this case a ship was not allowed to enter the dock area of Buenos Aires because the charterer had not obtained a "giro" or permit which would be issued only after a certificate had been obtained from the local grain board stating that a cargo of grain was available for loading. The vessel was kept waiting outside the docks for eighteen days. The charterers had taken all reasonable steps to provide the cargo to enable the vessel to become "an arrived ship," but the court held that their duty was an absolute one. Parker L.J. (as he then was) observed [71]: "I should have thought that the principle was plain, namely, that if the provision of a cargo is necessary to enable the ship to perform its obligation, namely, to become an arrived ship, the absolute obligation of the shipper is to provide the cargo, or at any rate a reasonable part of it, in order to enable the ship to perform its obligation."

---

[67] At p. 514.

[68] See *Little* v. *Stevenson & Co.* [1896] A.C. 108; *Jones, Ltd.* v. *Green & Co.* [1904] 2 K.B. 275; *Vergottis* v. *William Cory & Son, Ltd.* [1926] 2 K.B. 344.

[69] See above, note 66.

[70] [1958] 2 Q.B. 385.

[71] At p. 405.

It is submitted that there are two qualifications to the absolute nature of the charterer's obligation. First, as stated by Lord Halsbury in *Ardan Steamship Co., Ltd.* v. *Andrew Weir & Co.*,[72] the charterer is not obliged to be ready to meet every contingency, however remote, *e.g.*, the off-chance of a berth becoming vacant.[73] Secondly, where particular conditions at the port are known to both parties, the charterer's obligation to provide the cargo does not arise until such time as, in the light of those conditions, the ship's turn to load arises.[74]

In the United States it is the rule that in the case of a berth charterparty, the arrival of the ship is a condition precedent to the commencement of the running of the laytime, unless she is prevented from getting to the berth by the active fault of the charterer.[75]

---

[72] [1905] A.C. 501, at 510.

[73] As in *Little* v. *Stevenson & Son* (cited above, n. 68).

[74] *Jones, Ltd.* v. *Green & Co.* (cited above, n. 68).

[75] *Charles E. Hires & Co.* v. *Porto Rico International Corporation* (1922) 285 F. 645; *The Levi W. Ostrander* (1920) 271 F. 406; *Tweedie Trading Co.* v. *Thomsen* (1909) 173 F. 710; *Re 2,098 Tons of Coal* (1905) 135 F. 317.

FROM AIR LAW TO SPACE LAW

BIN CHENG

IN a subject such as space law, it is especially important to keep one's feet on the ground if the discussion is not to lapse into a branch of science fiction. The recipe for successful law-making, like government in general, is the art of the possible. Idealistic proposals which ignore the realities of international life can do more harm than good [1] to an emergent branch of the law where many urgent problems require international good will and co-operation for their solution.

The purpose of the present paper is to examine what has so far been achieved in air law, and the possibility of extending to outer space principles and standards that have already gained wide acceptance in the sphere of aerial navigation. In particular, attention will be focused on four basic principles underlying the Chicago Convention on International Civil Aviation, 1944,[2] to which seventy-seven states are parties. These four principles are (i) airspace sovereignty, (ii) nationality of aircraft, (iii) certain conditions to be fulfilled by aircraft engaged in international aerial navigation, their crews and passengers, and (iv) international co-operation and facilitation.[3]

I. AIRSPACE SOVEREIGNTY

A. Principle

Following the precedent set by the Paris Convention on the Regulation of Aerial Navigation, 1919,[4] the contracting states to the Chicago Convention, 1944, recognise in its first Article that "every state has complete and exclusive sovereignty over the airspace above its territory." Although prior to the First World War there was considerable discussion as to the exact legal status of the airspace above a state's territory, after the First World War the principle of airspace sovereignty became so widely accepted by states both in their municipal laws and in their diplomatic and treaty practice that it seems safe to conclude that it is now a well-recognised rule of international customary law.[5]

---

[1] *Cf.*, *e.g.*, Jessup and Taubenfeld, "Outer Space, Antarctica, and the United Nations," 13 Int.Org. (1959), p. 363, at p. 363: "Some of the current spate of writing about outer space is so highly imaginative as to discourage serious students of international organisation and law from pursuing detailed studies of very real problems which now confront the United Nations."

[2] *Cf.* ICAO, *Convention on International Civil Aviation*, 2nd ed., ICAO Doc. 7300/2 (1959).

[3] See further the writer's *The Law of International Air Transport* (in the press).

[4] 11 L.N.T.S., p. 173.

Article 2 of the Chicago Convention, 1944, specifies, for the purposes of the Convention, the lateral limits of airspace sovereignty by defining the meaning of state territory. Moreover, although the Convention makes no express reference thereto, it appears by implication to accept also the proposition that there is no national sovereignty over the airspace above the high seas and *terra nullius* which constitutes, therefore, free flight space.[6]

The Chicago Convention, 1944, does not, however, define the term airspace. Doubt may thus arise regarding the upper limit of national airspace. It would be well here to follow the rule of interpretation enunciated by the Permanent Court of International Justice in the *Eastern Greenland Case* (1932). In that case the Court had occasion to interpret the meaning of the term Greenland used in various diplomatic documents. It held that " the natural meaning of the term is its geographical meaning." [7] The natural meaning of the term airspace in the Paris and Chicago Conventions should, therefore, also be its geophysical meaning, denoting space where air is to be found.[8] Airspace is thus synonymous with atmospheric space, this being, moreover, clearly the intention of the framers of the Paris Convention, 1919.[9]

The territorial scope of a state's jurisdiction, as recognised in international air law, extends, therefore, upwards into space and downwards to the centre of the earth, the whole in the shape of an inverted cone. The sides of each cone are formed by straight lines projected downwards to the centre of the earth and upwards into space. As the earth is very nearly a true sphere, there will be neither gaps nor overlapping in between these inverted cones.

---

[5] See further the writer's "Recent Developments in Air Law," 9 *Current Legal Problems* (1956), p. 208, Part I: Airspace Sovereignty and Earth Satellites.

[6] See further the writer's "International Law and High Altitude Flights: Balloons, Rockets and Man-Made Satellites," 6 I.C.L.Q. (1957), p. 487, at p. 492 *et seq*.

[7] PCIJ: A/B 53, p. 52.

[8] *Loc. cit.* in note 5, above, at p. 210 *et seq*.

[9] In Art. 1 (1) of the Paris Convention, 1919, the French and Italian equivalents of the term airspace were respectively "*espace atmosphérique*" and "*spazio atmosferico*," in other words, atmospheric space.

This principle of airspace sovereignty, well recognised in air law, is equally applicable to space law. But the identification of airspace with the earth's atmosphere leaves undefined the exact upper limits of national sovereignty. Such a definition, while hitherto unimportant in air law, is one of the first and most important problems that have to be tackled in space law.

The existing legal position has been well summed up by Lord Hailsham in the House of Lords:

> "Her Majesty's Government consider that sovereignty over space above national territory cannot extend indefinitely upwards. It cannot, however, be said that international law has yet determined the exact limit to be placed on the extension of sovereignty upwards or what legal régime should apply in realms of outer space to which sovereignty does not extend. There are still too many unsolved problems in this field to justify the adoption at present of any sweeping legal propositions, in whatever direction they tend."[10]

This statement is interesting in that it (i) confirms the principle of airspace sovereignty; (ii) affirms that national sovereignty cannot extend indefinitely upwards; (iii) recognises that there is no exact delimitation of the upper limit of national sovereignty; (iv) considers that the legal régime of outer space is yet undecided, but at the same time (v) implies that national sovereignty does not now extend to outer space.

As regards the upper limit of airspace, it hardly needs to be recalled that the atmosphere of the earth does not end abruptly, but becomes thinner and thinner with every increase in height until its particles no longer fall back regularly towards the earth and it gradually disappears into the space beyond. A frontier belt exists, known as the exosphere, which varies in width and in height according to the season and the region of the world, but its base is estimated to lie generally at about 300–500 miles above the surface of the earth. If the principle of airspace sovereignty is taken literally, and states do not otherwise agree on a different delimitation, it may perhaps be said that this base of the exosphere constitutes the upper limit of national airspace.[11]

---

[10] June 11, 1959, 216 H.L.Deb. 5 s., col. 975.

This is not to say, however, that this rather ill-defined twilight region of almost 200 miles provides a satisfactory delimitation of the upper limit of national sovereignty. If, as Judge M. Huber has so rightly said in the *Island of Palmas Case* (1928), territorial sovereignty " serves to divide between nations the space upon which human activities are employed," [12] any frontier which is not unequivocal is bound to be a source of controversy. The most urgent task in space law is, therefore, to secure a general agreement among states fixing the precise upper limit of national sovereignty.

With effects limited to themselves, the parties to such an agreement are at liberty to choose any arbitrary distance as the extreme height of national space, which need not necessarily coincide with the limits of the terrestrial atmosphere. In such an agreement the contracting states may also, as among themselves, by consent and mutual recognition dispense with the condition of effective occupation otherwise regarded by international law as indispensable to a valid title to territorial sovereignty.[13] A somewhat similar situation may be found in the claim by maritime states to the continental shelf adjacent to their coast. Thus in the Geneva Convention on the Continental Shelf, 1958,[14] the term continental shelf is defined in a manner which differs from its purely geological concept (Article 1), and the condition of occupation, " effective or notional," is expressly waived (Article 2 (3)).

Doubt has, however, sometimes been expressed as to whether states may, even by agreement, extend their national sovereignty beyond the terrestrial atmosphere. It is said that, because of the rotation of the earth, its orbit around the sun and the movement of the solar system and the whole universe, the position of extra-terrestrial space is forever changing. This consideration, though at first sight weighty,[15] cannot, however, upon further reflection, be regarded as decisive.

---

[11] *Loc. cit.* in note 5, above, at p. 213 *et seq*.

[12] 2 R.I.A.A., p. 829, at p. 839.

[13] *Cf. ibid.* pp. 838–840, 869–871; see also PCIJ: *Eastern Greenland Case* (1933), A/B 53, and ICJ: *Minquiers and Ecrehos Case, I.C.J. Reports 1953*, p. 53; *cf.* also G. Schwarzenberger, " Fundamental Principles of International Law," 87 *Hague Recueil* (1955), Chaps. 3, 4 and 5, and *loc. cit.* in note 23, below.

[14] Cmnd. 584 (1958); *cf.* also L. C. Green, " The Geneva Conventions and the Freedom of the Seas," 12 *Current Legal Problems* (1959), p. 224, at p. 228.

First, this argument overlooks the fact that the surface of the earth itself also shares in these perpetual movements of all heavenly bodies, including what we call "immovables," which, no lawyer will likely dispute, are susceptible of possession. Secondly, it ignores the fact that frontiers are, as often as not, merely a matter of geometrical construction. Take, for instance, the meridian line of a boundary river, a straight baseline, the outer limit of the territorial sea and the lateral limits of national airspace. These are all purely notional lines drawn by reference to certain geographical features on this planet which itself is constantly moving. The continuous flow of the water or air enclosed by these notional lines in no way affects their legal validity as national frontiers. There seems, therefore, to be no reason why geometrical lines drawn by reference to specific features on the surface of the earth which enclose a portion of extra-terrestrial space cannot constitute valid national frontiers.

In fine, there is nothing inherently impossible in law or in geophysics which prevents states agreeing to an upper limit of national sovereignty beyond the atmosphere of the earth. In the United States a distance of 10,000 miles has been mentioned,[16] and, if states so agree, they are free to choose, with effects limited to those which consent to or recognise it, either this or any other figure.

This does not imply, however, that agreement among states on the subject will be easy or that the fixing of the upper limit of national sovereignty at a height well beyond the terrestrial atmosphere is necessarily in the interests of scientific exploration or the peaceful use of outer space.

---

[15] *Cf. loc. cit.* in note 5, above, p. 216 *et seq.*; *loc. cit.* in note 6, above, p. 493.

[16] Mr. Loftus E. Becker, Legal Adviser of the Department of State before the Special Committee on Space and Astronautics, U.S. Senate, May 6–15, 1958, National Aeronautics and Space Act, *Hearings*, pp. 333–334: "I would say 10,000 miles could well be taken as an outside limit, although we have never taken any exact position on the point."

From this point of view, the efforts of the two Geneva Conferences of 1958 and 1960 on the régime of the high seas to revise the width of the territorial sea are instructive for two reasons. First, they show that even portions of the high seas which are otherwise *res extra commercium*, that is to say, objects incapable in law of being appropriated by individual states, may be validly occupied to the extent to which such occupation is agreed to or recognised by other states—for any extension of the existing width of the territorial sea involves in effect an encroachment on the high seas. Secondly, if states wrangle so long over a few miles of the territorial sea, it will certainly be rash for anyone to suggest that they would, without difficulty, agree upon the exact height of their national sovereignty.

The foremost consideration that will influence the attitude of states in reaching a decision on this subject will be, as Soviet writers have already pointed out, that of national security.[17] While it is true that in these days of reconnaissance earth satellites and intercontinental ballistic missiles with nuclear warheads any system of national defence based purely on physical distance seems ruefully obsolete, yet if the history of air law offers any guide, states will most probably prefer to claim the greatest height practicable as the limit of their national space, leaving it to subsequent arrangements by agreement to remove or abate such obstacles and inconveniences as may be created by this vertical division of space.[18] For the present, as the United Kingdom Government has so clearly stated,[19] states are finding that there are yet too many unsolved problems to warrant the adoption of a rigid attitude towards the subject and resigning themselves temporarily to "wait and see."

---

[17] *Cf.* A. Galina, "On the Question of Interplanetary Law," 7 *Sovetskoe Gosudarstvo i Pravo* (1958), p. 52; English translation by F. J. Fieger and J. R. Thomas, reprinted in U.S. Senate, *Space Law Symposium* (1959), p. 508, at pp. 513–514: "The result at which we arrive thus reduces to the fact that the outer altitude limit of state sovereignty must be established in such a manner as to protect the state against encroachments on its territorial sovereignty, on its independence."

[18] *Cf.* the writer's "The Right to Fly," 42 *Grotius Society Transactions* (1956), p. 99, at p. 105 *et seq*.

[19] See above, notes 10 and also 16 regarding the United States.

During this period of uncertainty the two space Powers will doubtless busy themselves with gathering the hay while the orbits of their satellites are still unobstructed. The situation recalls that before the First World War, when states had not yet made up their minds as to the precise régime to be applied in their national airspace, and German reconnaissance balloons were for a time flying freely over the Low Countries. The side that is the first to be satisfied with its winnings, or alternatively the first to be frightened by the rate it is losing its chips, will presumably then kick the table over and ring down the space curtains.

But while the sky is literally the limit of national sovereignty, it would appear, on the other hand, that states would refuse to recognise spacecraft as artificial islands, drifting hither and thither, each with its own enveloping territorial space. This view is based on the increasingly territorial character of national sovereignty, whereby the territorial sea and national airspace are both regarded as appurtenances to land territory, and the general abandonment of the legal fictions that ships and diplomatic premises are extraterritorial portions of national territory. The net result would be that space lying outside recognised national space would in law become incapable of appropriation by individual states. Then, in a roundabout way, outer space, not because of its ever-changing position, but because it is not delimited by reference to territory on the surface of the earth, would achieve the same status as the high seas as *res extra commercium*.[20]

But extra-terrestrial bodies such as the moon and other planets must prima facie be regarded as *res nullius* which, like the New World and the continent of Africa at one time, are susceptible of being appropriated as national territory through effective occupation.[21] The requirement of effective control justifies the statement made in the United States that "neither Russia nor anyone else could claim the moon merely by planting a flag on it." [22]

Moreover, titles to territory, to be absolute, require the recognition of other states.[23] This consideration accounts for the sometimes seeming moderation of territorial claims made by states. Thus the Soviet Union, after the landing of Lunik I on the moon, declared that "there will be no territorial claims."[24] Indeed, it frequently occurs that states do not lay claims to a territory in which they have an interest, and yet refuse to recognise the territorial claims of any other state.[25] In case of dispute, the better claim—in terms of actual display of sovereignty and foreign recognition—prevails.[26] Thus it also follows that the longer a country exercises the functions of a state over a territory, the more difficult it becomes for other states to dispute its title. From this point of view, there may perhaps be more than a grain of truth in what Dr. von Braun was reported to have said: "It is quite possible that within two years the Russians would be able to put a 'bus load of astronauts' into space. . . . If we continue at this leisurely pace we will have to pass Russian Customs when we land on the moon." [27]

---

[20] See above, p. 233.

[21] See above, note 13.

[22] Mr. Loftus E. Becker, reported in *The Times*, March 7, 1959.

[23] *Cf.* G. Schwarzenberger, *International Law*, Vol. I (3rd ed., 1957), p. 299 *et seq.*

The successful conclusion of a treaty in 1959 freezing for thirty years all territorial claims to Antarctica, which shall remain demilitarised,[28] might encourage the hope of a similar agreement in respect of outer space. But, while such an agreement is certainly possible, its probability is doubtful. It might, indeed, be thought that the Antarctica Treaty became possible only when rocketry and space exploration had deprived that continent of much of the strategic importance which its possession was at one time thought capable of conferring.

This scepticism does not imply that the restriction of outer space, including all extra-terrestrial bodies, to peaceful uses is not regarded as eminently desirable from the standpoint of humanity at large. The doubt is based on the fact that rocketry and space exploration are proving to be of vital military significance, involving the necessity to review and revise every aspect of strategic planning. Unless it be within the context of a much wider political accommodation between East and West, any effort to restrict outer space to purely peaceful uses appears to be no more than a pious hope and any lip-service declaration subscribed to by states, for instance, in the form of a unanimous Resolution of the General Assembly of the United Nations, would amount to little more than Declaration I of the First Hague Peace Conference of 1899. In this Declaration the contracting Powers agreed to " prohibit, for a term of five years, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature." When the time came for the renewal of this undertaking at the Second Hague Peace Conference of 1907, as Pearce Higgins summed it up, " the development in the science of aerostatics since 1899 caused several states which had supported the Declaration in 1899 either to refrain from voting or to oppose the proposal." [29]

---

[24] Professor A. Topchiev, Deputy Chairman of the Soviet Academy of Sciences, Press Conference, September 15, 1959, reported in *The Times*, September 15, 1959.

[25] *Cf.* the 1912 Protocol between Norway, Russia and Sweden regarding Spitzbergen which, owing to the First World War, did not, however, come into effect; *cf.* Niemeyer and Strupp, 1 *Jahrbuch des Völkerrechts*, p. 142.

[26] *Cf. Island of Palmas Case* (1928) 2 R.I.A.A., p. 829, at pp. 838–839: "If a dispute arises as to the sovereignty over a portion of territory, it is customary to examine which of the states claiming sovereignty possesses a title . . . superior to that which the other state might possibly bring forward against it."

[27] *The Times*, October 31, 1959.

[28] The Antarctica Treaty, December 1, 1959, Cmnd. 913 (1959).

It would appear, therefore, that no matter how attractive proposals for the internationalisation of outer space may seem, states are most likely to insist on a relatively high ceiling to their national sovereignty, leaving any inconveniences that may arise therefrom to be ironed out by subsequent agreements.

B. Consequences

Once national space is defined, the result will be that no flight-craft may fly in, into or through another state's national space without its permission, acquiescence or tolerance, at no matter what altitude.[30] This is the position of national airspace in present-day air law, and it is implicitly confirmed in the Chicago Convention, 1944, in addition to its Article 1, by, *inter alia*, its Articles 3 (state aircraft), 5 (non-scheduled flights), 6 (scheduled air services), 7 (cabotage) and 8 (pilotless flights). Furthermore, once an aircraft has been permitted to fly into or over the territory of another state, the machine, its crew and passengers, must comply with local laws and regulations. This consequence of the principle of airspace sovereignty is expressed in many of the provisions of the Chicago

---

[29] *The Hague Peace Conferences* (1909), p. 489.

[30] *Loc. cit.* in note 6, above, p. 494 *et seq.*

Convention, 1944, which, moreover, leaves the contracting states a large measure of discretion as to the substance of these laws and regulations.[31]

So far there has been little opposition to the passage of foreign artificial earth satellites over national territories. The initial perigees and apogees of the orbits of Sputnik I, Discoverers I, II, V, VII, XI and the Soviet Space Ship are, respectively, 142–588, 99–605, 142–220, 136–450, 100–520, 109–380 and 193–230 miles. These are all wholly or partly in the earth's atmosphere and, assuming that the sovereignty of states extends to approximately 300–500 miles, within the national airspace of the countries over which they pass.

The lack of protest about these satellites up to now hardly affects the principle of airspace sovereignty; for those states which directly or indirectly took part in the International Geophysical Year, and those now taking part in the work of COSPAR (the Committee on Space Research of the International Council of Scientific Unions), can be said to have given their implied consent. For the rest, the passage of such satellites through national airspace depends on the tacit acquiescence of the states over which their orbits pass. It would be erroneous otherwise to conclude that a legal right of innocent passage has already arisen in favour of artificial satellites, similar to the right of innocent passage of merchant ships through foreign territorial seas.

As the Permanent Court of International Justice has pointed out in the *Lotus Case* (1927), in order to speak of a duty of abstention under international customary law, it is essential to prove not only the existence of a practice or usage (*consuetudo*) but also a conviction on the part of states in general that the practice is legally binding (*opinio juris sive necessitatis*). "For only if such abstention were based on their [states'] being conscious of having a duty to abstain would it be possible to speak of an international custom."[32] At present, it can hardly be said that states are of the view that they have a legal right to launch satellites through the airspace of other states or that they are under a legal duty to suffer the passage of foreign artificial satellites through their own national airspace.

---

[31] See further below, pp. 243, 246 *et seq.* and 250 *et seq.*

[32] PCIJ: A 10, p. 28; see also ICJ: *Asylum Case, I.C.J. Reports 1950*, p. 266, at p. 276, and *Rights of U.S. Nationals in Morocco Case, I.C.J. Reports 1952*, p. 176, at p. 200.

It has already been suggested that states may at any time raise the barriers of national sovereignty to space exploration.[33] When that happens, spacecraft may pass over the territory of foreign states only with their consent and, in doing so, must comply with any condition that they may impose.

C. Privileges exchanged

It follows from the concept of airspace sovereignty that the first objective in any aeronautical agreement is to exchange the right to fly, to which all other concessions become subordinated.

In this regard the Chicago Convention, 1944, first distinguishes between state aircraft and civil aircraft. State aircraft are those "used in military, customs and police services" (Article 3). The test is, therefore, functional and does not depend on ownership. Aircraft owned by the contracting states which do not fall within the above definition are, for the purposes of the Convention, regarded as civil aircraft to which alone the Convention applies.[34] In addition, the Convention excludes from its operation pilotless aircraft which are not permitted to overfly the territory of another contracting state without a special authorisation by that state (Article 8).

Of manned civil aircraft, the Chicago Convention, 1944, for the purpose of conferring the right to fly, distinguishes between commercial and non-commercial flights. Commercial flights are those which carry passengers, cargo or mail for remuneration or hire, and are subdivided into scheduled and non-scheduled flights.

In respect of non-commercial flights, the Convention grants a fairly liberal right for aircraft bearing the nationality of any of the contracting states to fly into the territory of other contracting states or to fly across it with or without a stop. No right of entry or transit is granted in respect of scheduled air services, while that granted in respect of non-scheduled commercial flights is rather nominal. Consequently, commercial flights, whether scheduled or non-scheduled, may be performed over the territories of other contracting states only on the basis of supplementary treaties, both multilateral and bilateral.[35] Economic rights other than commercial carriage, for instance, various types of aerial work such as aerial survey or crop dusting, are not included in the Chicago Convention, 1944, nor generally granted on a treaty basis.

---

[33] See above, p. 234.

[34] See further the writer's "State Ships and State Aircraft," 11 *Current Legal Problems* (1958), p. 225.

As regards space flights, a distinction must thus be made between military agreements among states closely integrated one with another which co-operate in the development of military missiles and space vehicles of military application, and general conventions designed to include the totality or the majority of states for the peaceful uses of outer space.

In any proposed International Convention for the Peaceful Exploration and Exploitation of Outer Space it is to be expected, therefore, that its scope would be limited to the equivalent of civil aircraft, although, in the nature of things, it would be impracticable, at least for the present, to exclude unmanned civil spacecraft, even if special regulations may have to be devised to ensure their safe operation.

In regard to civil spacecraft, manned or unmanned, states will probably have little objection to purely scientific flights across their national space, subject to safeguards which they may wish to establish in the interest of national security. Indeed, so far, states may be said to have behaved with commendable liberality in this regard.

Until national satellites can be launched, so that there is no case for protectionism, states will presumably also be liberal regarding the passage of meteorological, communication or navigational satellites, even when they are performing services for financial considerations. On the one hand, encouragement may be derived from the comparative ease with which, during the inter-war period, rights for commercial flights were granted by, for instance, Latin-

---

[35] See *loc. cit.* above in notes 3 and 18; on cabotage, see below, p. 246.

American countries when they themselves did not dispose of sufficient air transport facilities. On the other hand, the attitude, during the same period, of some states which were situated along certain trunk air routes, such as Turkey and Persia, may give rise to the fear that a strategically situated state might exploit its geographical location for the purpose of extracting countervailing gains in return for the right of passage. Where a sufficient degree of international good will exists, parties to an eventual International Convention might even agree to allow the launching of foreign civil spacecraft from within their territories.

Once, however, rocketry becomes as common as aeronautics, then commercial rivalry may well create a situation which now weighs heavily on international civil aviation. Every privilege will then be granted only against commensurate advantages being given in return.[36]

When the right of entry and transit has been granted, attention must be turned to ancillary privileges without which the right itself may be deprived of much of its meaning.

Thus, under the Chicago Convention, 1944, contracting states grant one another, in respect of their scheduled air services, national treatment in the matter of prohibited areas and, in respect of all flights, equal treatment as among the contracting states, in the application of temporary restriction or prohibition of flying in exceptional circumstances (Article 9).

Moreover, in respect of all flights, the standard of national treatment and equal treatment as among all contracting states is accepted:

—in the application of air regulations (Article 11);

—in the conditions governing the use of " all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation " (Article 15);

—in " charges that may be imposed or permitted to be imposed by a contracting state for the use of . . . airports and air navigation facilities " (Article 15);

---

[36] *Ibid.*

—in the regulation or prohibition of the carriage of dangerous articles by aircraft over a state's territory (Article 35).

In addition, the following ancillary privileges are exchanged:

—prohibition of "fees, dues or other charges" being "imposed by any contracting state in respect solely of the right of transit over or entry into or exit from its territory of any aircraft of a contracting state or persons or property thereon" (Article 15);

—temporary exemption from duty "subject to the customs regulations of the state" of "aircraft on a flight to, from, or across the territory of another contracting state" (Article 24);

—exemption from customs duty, inspection fees or similar charges of fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting state or imported into the territory of a contracting state for incorporation in or use on an aircraft of another contracting state engaged in international air navigation (Article 24);

—exemption of the aircraft of another contracting state or its owner or operator during an authorised entry into or transit across the territory of another contracting state, while engaged in international air navigation, from any claim, seizure, detention or interference by the territorial state or any person therein, on the ground of an alleged infringement of any patent or registered design rights (Article 27);

—mutual recognition of certificates of airworthiness and certificates of competency and licences issued or rendered valid by the contracting state in which an aircraft is registered, provided that the requirements under which such certificates or licences were issued or rendered valid are equal to or above the minimum standards which may be established from time to time by the International Civil Aviation Organisation (Article 33)[37];

—duty of each contracting state in the territory of which an aircraft of another contracting state has met with an accident "involving death or serious injury, or indicating serious technical defect in the aircraft or air navigation facilities":

---

[37] See below, p. 250.

—to "institute an inquiry into the circumstances of the accident, in accordance, so far as its laws permit, with the procedure which may be recommended by the ICAO "[38];

—to afford the contracting state in which the aircraft is registered " the opportunity to appoint observers to be present at the inquiry "; and

—to " communicate the report and findings " of the inquiry to the state of registration (Article 26);

—duty of each contracting state in the event of an aircraft (whether or not, it would appear, registered in another contracting state) in distress in its territory:

—" to provide such measures of assistance . . . as it may find practicable ";

—" to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the state in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances "; and

—when undertaking search for missing aircraft, to " collaborate in co-ordinated measures which may be recommended from time to time " by the ICAO (Article 25).[39]

Most of the ancillary privileges which have been evolved in relation to civil aviation appear applicable *mutatis mutandis* to civil spacecraft, including a liberal use of the standard of national treatment and equal treatment as among the contracting states in the application of flight regulations, use of ground facilities, including tracking facilities. Other privileges may well include exemptions from charges or dues imposed solely in respect of the right of transit, from customs duties on the spacecraft or its stores, fuel, spare parts and equipment, from seizure, detention or interference based on alleged infringement of patent or registered design rights, mutual recognition of minimum standards of safety, mutual co-operation and assistance in the recovery of unmanned spacecraft which have re-entered the terrestrial atmosphere, or manned spacecraft in distress or involved in accidents.

---

[38] See below, p. 250.
[39] See below, p. 250.

II. NATIONALITY OF FLIGHTCRAFT

The second important principle accepted by parties to the Chicago Convention, 1944, is that enunciated in Article 17:

> "Aircraft have the nationality of the state in which they are registered."

The practical importance of this principle is that it opens the way to rights and liabilities being grafted directly on to the aircraft, irrespective of the nationality of its owner or operator.

Moreover, nationality being one of the most important devices for the allocation of objects of international law to the various subjects of international law,[40] the attribution of a nationality to aircraft also simplifies the task of resolving which is the subject of international law most directly concerned with a given aircraft. Rights and duties under international law in respect of aircraft may then be created directly and attached to the state the nationality of which the aircraft possesses.

Thus, under Article 12 of the Chicago Convention, every contracting state is obliged to ensure "that every aircraft carrying its nationality mark, wherever such aircraft may be, shall comply with the rules and regulations relating to the flight and manoeuvre of aircraft" in force at any given place, including, over the high seas, rules of the air established by the ICAO,[41] and "each contracting state undertakes to insure the prosecution of all persons violating the regulations applicable."[42] Moreover, certificates of airworthiness (Article 31), licences for radio transmitting apparatus (Article 30 (*a*)), and of the operating crew (Articles 30 (*b*) and 32), are to be those issued or rendered valid by the state in which the aircraft is registered.[43]

At present, spacecraft have been launched only by states, and the problem of nationality has hardly arisen; for every state is directly responsible for spacecraft owned, operated or launched by it. But in the absence of recognised nationality for spacecraft, the subject of international law primarily responsible for spacecraft owned, operated or launched by private individuals, including commercial concerns, will be the state where the spacecraft are launched rather than the state of which their owners or operators are nationals.[44] There is, on the whole, much to be said for extending the institution of nationality based on registration to spacecraft, leaving the territorial state responsible merely for failure to exercise due diligence in preventing the launching of unregistered spacecraft that may injure the rights of other states, or those of their nationals.

---

[40] See *loc. cit.* in note 23, above, p. 354 *et seq.*

[41] See below, p. 250.

[42] See further the writer's "Crimes on Board Aircraft," 12 *Current Legal Problems* (1959), p. 177.

[43] *Cf.* also Arts. 39–42.

III. CONDITIONS TO BE FULFILLED BY FLIGHTCRAFT, THEIR CREWS AND PASSENGERS

The Chicago Convention, 1944, imposes a number of conditions with which aircraft of contracting states engaged in international air navigation, their crews and passengers must comply, especially when over the territory of another contracting state.

A. Conditions regarding the instruments of flight

As has already been mentioned,[45] the benefits exchanged among the contracting states under the Chicago Convention, 1944, do not extend to state aircraft and pilotless aircraft. These aircraft may not overfly the territory of another contracting state without special authorisation. Moreover, " every aircraft engaged in international navigation shall bear its appropriate nationality and registration marks " (Article 20) and " shall be provided with a certificate of airworthiness issued or rendered valid by the state in which it is registered " (Article 31). When in or over the territory of another contracting state, it may " carry radio transmitting apparatus only if a licence to install and operate such apparatus has been issued by the appropriate authorities of the state in which the aircraft is registered. The use of radio transmitting apparatus in the territory of the contracting state whose territory is flown over shall be in accordance with the regulations prescribed by that state " (Article

---

[44] *Cf. loc. cit.* in note 6, above, p. 498 *et seq.*
[45] See above, p. 238.

30 (*a*)). Under Article 36 of the Convention, “each contracting state may prohibit or regulate the use of photographic apparatus in aircraft over its territory.”

Article 34 of the Convention prescribes that “there shall be maintained in respect of every aircraft engaged in international navigation a journey log book . . . in such form as may be prescribed from time to time pursuant to this Convention.”[46] In addition, under Article 29 of the Convention, “every aircraft of a contracting state, engaged in international navigation,” must carry the following documents:

> “(*a*) Its certificate of registration;
> (*b*) Its certificate of airworthiness;
> (*c*) The appropriate licences for each member of the crew;
> (*d*) Its journey log book;
> (*e*) If it is equipped with radio apparatus, the aircraft radio station licence;
> (*f*) If it carries passengers, a list of their names and places of embarkation and destination;
> (*g*) If it carries cargo, a manifest and detailed declarations of the cargo.”

B. Conditions governing the type of operation

It follows from the exclusion of state aircraft and pilotless aircraft from the scope of the Chicago Convention, 1944, that the benefits conferred by the Convention inure only to manned civil aircraft bearing the nationality of a contracting state, whether owned or operated by a contracting state or by private individuals. An important duty accepted by the contracting parties which may be of especial significance in any international agreement on the peaceful uses of outer space is that found in Article 4:

> “Each contracting state agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.”

The Chicago Convention, 1944, also prohibits the carriage of munitions of war or implements of war without the permission of the state flown over (Article 35). Moreover, each contracting state reserves the right, for reasons of public order and safety, to regulate or prohibit the carriage in or above its territory of other articles (Article 35). In this connection, mention has already been made of the power of each contracting state to prohibit or regulate the use of photographic apparatus in aircraft over its territory.[47]

---

[46] See below, p. 250.

Apart from these general restrictions, the right to fly granted under the Chicago Convention, 1944, varies according to the type of operation in which an aircraft is engaged. Cabotage and scheduled commercial services depend on special authorisation of the states flown over, while non-scheduled commercial flights are subject to such regulations, conditions or limitations as the state overflown may consider desirable. Only private flights not carried out for remuneration or hire are more or less free from restrictions as regards the right of entry and transit.[48]

C. Conditions governing the operating crew

Article 32 (*a*) of the Chicago Convention, 1944, provides that " the pilot of every aircraft and the other members of the operating crew of every aircraft engaged in international navigation shall be provided with certificates of competency and licences issued or rendered valid by the state in which the aircraft is registered." Moreover, when an aircraft registered in one contracting state is in or over the territory of other contracting states, " radio transmitting apparatus may be used only by members of the flight crew who are provided with a special licence for the purpose, issued by the appropriate authorities of the state in which the aircraft is registered " (Article 30 (*b*)).

D. Entry and departure

Article 10 of the Chicago Convention, 1944, permits every contracting state to require all foreign aircraft entering or leaving its territory to do so only at designated customs airports. Under Article 5 of the Convention, notwithstanding the right of transit non-stop granted in respect of non-scheduled flights, a state may nevertheless, by virtue of the same Article, require the aircraft of another contracting state flying over its territory to effect a landing. Moreover, although Article 5 grants the right of entry and transit to aircraft of other contracting states engaged in non-scheduled flights without the need of obtaining prior diplomatic permission, it at the same time permits each contracting state, " for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights." [49]

---

[47] See above, p. 245; see above, p. 244, regarding radio apparatus.

[48] See above, pp. 238–239.

In addition, Article 9 of the Convention authorises contracting states to establish prohibited areas or temporarily to restrict or prohibit flying over the whole or any part of their territories " in exceptional circumstances or during a period of emergency, or in the interest of public safety." [50]

" The laws and regulations of a contracting state as to the admission to or departure from its territory of passengers, crew, or cargo of aircraft, such as regulations relating to entry, clearance, immigration, passports, customs, and quarantine shall be complied with by or on behalf of such passengers, crew or cargo upon entrance into or departure from or while within the territory of that state " (Article 13). " The appropriate authorities of each of the contracting states shall have the right, without unreasonable delay, to search aircraft of the other contracting states on landing or departure, and to inspect the certificates and other documents prescribed by this Convention " (Article 16).[51]

Moreover, in order that aircraft of the contracting states may enjoy certain of the customs exemptions granted by the Convention, they must comply with the pertinent customs regulations of the territorial state (Article 24). Likewise, spare parts and spare equipment in storage in another contracting state for use or installation in the repair of an aircraft of a contracting state benefit from the exemption, in the former state, from claims, seizure, detention or interference on the ground of alleged infringement of patent or registered design rights only if " any patented part or equipment so stored shall not be sold or distributed internationally in or exported commercially from the contracting state entered by the aircraft " (Article 27 (*b*)).

---

[49] *Cf.* also Art. 68 regarding scheduled flights.

[50] See also above, p. 240.

[51] See above, p. 245.

E. Observance of aeronautical regulations

Under the Chicago Convention, 1944, there is not only a right, but also a duty incumbent on every contracting state, to ensure that, first, every aircraft flying over or manoeuvring within its territory shall comply with its aeronautical regulations and, secondly, every aircraft bearing its nationality wherever it may be shall comply with the aeronautical regulations there in force (Article 12). Furthermore, the use of radio transmitting and photographic apparatus in the territory of the contracting state whose territory is flown over shall be in accordance with the regulations prescribed by that state (Articles 30 (*a*) and 36).

The various conditions enumerated above governing civil aircraft of the contracting states to the Chicago Convention, 1944, when engaged in international navigation are admittedly of a rather technical and detailed nature which are further elaborated in international standards and recommended practices made by the International Civil Aviation Organisation.[52] For this reason, they may not be entirely suited to space flights. Yet, certain of the conditions of a more or less general character may provide useful analogies.

Thus, with regard to the instruments of flight, the exclusion of spacecraft used in military, customs and police services appears to be eminently appropriate. Moreover, the need for every spacecraft to be clearly identified by advance notice of launching and radio signals is a matter of some urgency and importance; for it might well help to prevent a tragedy of errors in a period of political tension when a misguided rocket can easily trigger off a cosmic war. The use of radio and photographic apparatus, including the choice of radio frequencies, is also a matter which cries out for regulation. In fact, at the 1959 Administrative Radio Conference of the International Telecommunications Union the Radio Regulations established at Atlantic City, 1947, were extensively revised and for the first time include allocations of radio frequencies for space and earth–space transmission services. The same Conference also adopted a recommendation (No. 35) for the convening of an Extraordinary Administrative Radio Conference during the latter half of 1963 with an agenda which will pay special attention to telecommunication problems arising out of space research.[53]

---

[52] See below, p. 250.

Furthermore, while the carriage of log books and other documents may be, at the present juncture, rather premature, an undertaking by contracting states to a general convention on outer space not to use civil spacecraft for any purpose inconsistent with the peaceful exploration and exploitation of outer space must be regarded as highly desirable. A general prohibition of the carriage of munitions of war, implements of war and other dangerous articles by spacecraft when over the territory of other contracting states to such an agreement can only be considered as sound common sense.

Again, while it may be premature now to lay down hard-and-fast rules concerning the crew and passengers of spacecraft, it would, however, be hardly out of place to reserve the right of the states overflown to establish prohibited areas and temporarily to forbid or regulate the passage of space vehicles across their territories in time of emergency or other exceptional circumstances. Moreover, when and if astronautical regulations are drawn up, whether nationally or internationally, it would again be only right that they should be observed.

IV. INTERNATIONAL CO-OPERATION AND FACILITATION

The fourth basic principle accepted by the contracting parties to the Chicago Convention, 1944, is that of mutual co-operation and facilitation in the development of international air transport. This principle finds expression in three different directions: (i) standardisation of aeronautical regulations and procedures, (ii) provision of the infrastructure of international aerial navigation, and (iii) the mutual facilitation of international air transport.

---

[53] *Cf.* A. Henry, "The Administrative Radio Conference," *Telecommunication Journal (ITU)* (1960), p. 40*e*, at p. 41*e*; E. Wenk, *Radio Frequency Control in Space Telecommunications*, U.S. Senate Committee on Aeronautical and Space Sciences, 86th Congress, 2nd Session, Committee Print (1960), which, in its Appendix G (p. 149 *et seq.*), reproduces the provisional text (January 1960) of Art. 5 (Frequency Allocations, 10 Kc/s to 40 Gc/s) of the 1959 Radio Regulations; *cf.* also the International Telecommunications Convention, Geneva, 1959.

A. Standardisation

In the sphere of international standardisation, rules and regulations relating to civil aviation present the obvious starting-point. General obligations undertaken by the contracting states to the Chicago Convention, 1944, may be found in Articles 12, 28 and 37, relating to the rules of the air, communication procedures, codes, markings, signals, lighting and other operating practices and rules, aeronautical maps and charts, and, generally, uniformity in "regulations, standards, procedures, and organisation in relation to aircraft, personnel, airways and auxiliary services in all matters in which such uniformity will facilitate and improve air navigation." Other provisions which are also relevant are Articles 14 (sanitary regulations), 23 (customs and immigration procedures), 25 (search and rescue), 26 (investigation of accidents), 29 (documents), 33 (certificates of airworthiness and certificates of competency) and 35 (definition of munitions of war or implements of war for the purpose of prohibited carriage).

The principal method to achieve this international standardisation is through the quasi-legislative and pre-legislative procedures of the International Civil Aviation Organisation, under which fifteen Annexes to the Chicago Convention, 1944, five Procedures for Air Navigation Services (PANS), various Regional Supplementary Procedures (SUPPS) and three international treaties have been adopted and are still operative.[54]

One of the topics not covered by these documents is the duty assumed by the contracting states under Article 14 of the Convention to prevent the spread of disease. Primary responsibility in this field now rests with the World Health Organisation. Under its constitution the WHO enjoys a quasi-legislative power similar to that of the ICAO Council. On May 25, 1951, the Fourth World Health Assembly unanimously adopted the International Sanitary Regulations (WHO Regulations No. 2),[55] which entered into force on October 1, 1952. Additional regulations were adopted by the Eighth World Health Assembly in 1955,[56] and the Ninth Assembly in 1956.[57] A consolidated edition of the Regulations containing these additions was published in 1957.[58] For most states, these are the relevant regulations applicable to international air travel.

---

[54] See further the writer's "Centrifugal Tendencies in Air Law," 10 *Current Legal Problems* (1957), p. 200, at p. 203 *et seq.*

In the realm of space flights a great deal of work has already been done by the International Council of Scientific Unions during and since the highly successful International Geophysical Year. Even the duty to prevent the spread of disease finds an echo in the agreement adopted to sterilise all space vehicles that may otherwise contaminate extra-terrestrial bodies.

Once it is decided to draw up a general agreement to regulate the peaceful exploration and exploitation of outer space, the contracting states may do well to agree also on the setting up of an international organisation similar to the ICAO established under the Chicago Convention, 1944. Such a World Organisation for Outer Space (WOFOS) will then be able to continue the work hitherto performed on a non-governmental level by the International Council of Scientific Unions.

B. *Infrastructure*

Under Article 28 of the Chicago Convention, 1944:

> " Each contracting state undertakes, so far as it may find practicable to:
>
> " (*a*) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention. . . ."

---

[55] WHO, *Technical Report Series*, No. 41 (1951).
[56] WHO, 64 Off.Rec. (1955), pp. 84–86.
[57] WHO, 72 Off.Rec. (1956), pp. 80–83.
[58] WHO, *International Sanitary Regulations* (Annotated ed., 1957).

Under Article 69, if the ICAO Council considers that the airports or other air navigation facilities, including radio and meteorological services, of a contracting state are not reasonably adequate for the safe, regular, efficient and economical operation of international air services, present or contemplated, the Council may make recommendations for the purpose of finding means by which the situation may be remedied. In addition to the adoption of relevant international standards and recommended practices, the most concrete way whereby the ICAO can help in improving the infrastructure of international civil aviation is through its administrative function in operating joint financing schemes in support of air navigation services and facilities. To date, three separate arrangements are in operation, all in the North Atlantic area: (i) North Atlantic Ocean Stations, (ii) air navigation services in Greenland and the Faeroes, and (iii) air navigation services in Iceland.

Apart from the adequacy of the infrastructure of international civil aviation, there is the problem of its availability. Article 15 of the Chicago Convention, 1944, thus lays down the standard of national treatment and equal treatment as among the contracting states in the use, "by aircraft of every contracting state, of all air navigation facilities, including radio and meteorological services, which may be provided for public use for the safety and expedition of air navigation. . . ."

Then there is the problem of charges for the use of airports and other air navigation facilities. Again, Article 15 of the Convention imposes the standard of national treatment in favour of aircraft bearing the nationality of other contracting states, subject to the right of the ICAO Council to review such charges and to make recommendations thereon for the consideration of the state or states concerned. The matter of airport and air navigation facilities charges has, however, been, in practice, an extremely thorny problem and two conferences were held, one on airport charges in 1956,[59] the other on route facilities charges in 1958.[60] A number of recommendations was adopted by each conference, without affecting unduly the discretion of member states to proceed as they were wont.

---

[59] *Proceedings*, ICAO Doc. 7745, APC/1 (1956), 3 vols.

[60] *Proceedings*, ICAO Doc. 7874, RFC/1 (1958), 2 vols.

Mention may, however, perhaps be made of two abortive proposals in regard to the provision of the infrastructure of international civil aviation made by the Interim Assembly of the Provisional International Civil Aviation Organisation prior to the establishment of the ICAO. These were:

(i) the establishment of an international agency supported by contributions of member states to provide, operate and maintain all communications facilities and ground aids, but excluding airports, over all or certain international civil air routes, and

(ii) the establishment of a common fund for the provision of airport and other air navigation facilities to which all member states contribute.[61]

When the ICAO was set up, the ICAO Council which had been requested to examine these proposals reported to the ICAO Assembly in 1950 that the first proposal was neither realistic nor desirable and that the second proposal had in fact been superseded by the joint support programme of the Organisation.[62]

Be that as it may, experience has shown the greater need for adequate ground facilities in space programmes and the considerably higher costs required for their installation and operation. Under the circumstances, states entering into a general agreement on outer space may perhaps be induced to give further thought to these two schemes as applied to the peaceful exploration and exploitation of outer space, thereby circumventing the difficulties which airport and route facilities charges have given rise to in international civil aviation.

C. *Facilitation*

Under Article 22 of the Chicago Convention, 1944:

> "Each contracting state agrees to adopt all practical measures, through the issuance of special regulations or otherwise, to facilitate and expedite navigation by aircraft between

---

[61] ICAO Doc. 1811, A/40; see also ICAO Doc. 7462–C/870 (1954), Appendix V, p. 61 *et seq.*

[62] ICAO Doc. 4968, A4–P/1, p. 61; see also above, p. 252.

> the territories of contracting states, and to prevent unnecessary delays to aircraft, crews, passengers and cargo, especially in the administration of the laws relating to immigration, quarantine, customs and clearance."

As the ICAO has pointed out, " the basic aim of the Organisation in the field of Facilitation is to achieve, to the maximum degree consistent with the public interest, free and unimpeded passage of aircraft and the crews, passengers, baggage, cargo and mail that they carry on international flights. The principal means by which this aim can be accomplished are simplified and uniform procedures, amendments to regulations which may delay or restrict the movement of international traffic, and continuing efforts on the part of airport authorities and operators of international flights to reduce ground delays to a minimum." [63]

Of all the topics in the Chicago Convention, 1944, examined above, perhaps only Facilitation appears slightly remote when applied to space research and exploitation. Yet it can hardly be denied that the same spirit of good will which underlies the field of Facilitation in international air transport will be even more urgently required if international co-operation in man's newly conquered dimension is to achieve its maximum effect.

It is indeed far from the intention of the present paper to suggest that space law is but air law writ large, or that principles and standards accepted in air law may be mechanically transposed to the field of space law. What it is hoped that the present paper may have, in some small way, contributed is to stimulate discussions of the subject of space law along concrete rather than speculative, practicable rather than idealistic, lines, so that those actually called upon to cope with such problems may find therein, instead of a cloud of glorious aspirations, a few historical pointers to order in outer space.

---

[63] ICAO, *Aims and Objectives of ICAO in the Field of Facilitation*, ICAO Doc. 7891–C/908 (1958), p. 3.

GENTLEMEN'S AGREEMENTS AND THE SECURITY COUNCIL

L. C. Green

Any organ of an international political body which does not consist of all the members of the organisation is going to be faced with the problem of the proper basis of representation.

In the Covenant of the League of Nations provision was made for a Council of which the Principal Allied and Associated Powers would enjoy permanent membership, while four others would be "selected by the Assembly from time to time in its discretion." It was recognised, however, that international life is dynamic and provision was therefore made whereby, "with the approval of the majority of the Assembly, the Council may name additional Members of the League, whose Representatives shall always be Members of the Council." With the admission of Germany into the League of Nations and the increase in membership of the Council, it was agreed that, in principle, non-permanent members should not be eligible for immediate re-election, although by a two-thirds majority of the Assembly this rule could be relaxed so as to permit the continual re-election of particular members and the creation of what were virtually semi-permanent seats. It was generally understood that three seats would thus become semi-permanent and be occupied by Poland, Spain and Brazil. The six ordinary places would be available for rotation, giving each of the small states representation about once in twenty years.[1]

Apart from the semi-permanent seats in the Council, there was apparently complete freedom of choice with regard to the election of the non-permanent members. In practice, however, the seven non-permanent seats were filled in "accordance with a system of group representation." Three seats were always occupied by Latin American states. Elections were for three-year periods, so that one such state could retire each year being replaced by another from the same region. "The choice of the latter was usually made—unofficially but effectively—at a separate meeting of Latin American delegates held before the Assembly vote." The four others came from Asia, the Little Entente, the British Commonwealth and the European ex-neutrals. There was no formal agreement embodying this arrangement, but it was maintained throughout the history of the League and practically without challenge. While it enabled most members of the League to expect election to the Council at some time, "it was, however, a complete bar to a few members, such as Portugal, Austria and Hungary, which belonged to no recognised group. Their grievance was met in 1933 by the temporary creation of an additional elective seat."[2]

---

[1] Walters, *A History of the League of Nations* (1952), Vol. 1, p. 324.

SECURITY COUNCIL ELECTIONS

Article 23 of the Charter of the United Nations provides that, in electing the six non-permanent members, due regard is to be "specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organisation, and also to equitable geographical distribution." Wording of such a character opens the way to representation of regions and also of those middle or strategic Powers upon whom the success of enforcement measures to a great extent depends. Thus, in 1945 the representative of Canada suggested that the Article would be properly satisfied if Australia, Brazil, Canada and the Netherlands were among those elected.[3] It should be remembered that no provision is made in the Charter, or in the Rules of Procedure of the General Assembly, for any state to be nominated for membership of the Security Council. Theoretically, therefore, it is open to every member of the United Nations—other than the five permanent members and, in all elections since the first, the three sitting non-permanent members as well as the three resigning since they are not eligible for immediate re-election—to nominate itself.

---

[2] *Ibid.* p. 335; see also Nicholas, *The United Nations as a Political Institution* (1959), pp. 65–68.

[3] For a description of some of the controversies concerning voting for the Security Council until 1953, see Green, "The Security Council in Retreat," 8 *Year Book of World Affairs* (1954), p. 95, at p. 106 *et seq.*

To allow complete discretion in the nominations would lead to complete anarchy, and in 1945 the representative of New Zealand contended that proper attention should be paid to British Commonwealth interests in the Pacific. It was not only Commonwealth states that were suggesting how the non-permanent seats should be filled. The Ukrainian Republic proposed that the six seats should be distributed so as to award two to Latin America, one to Eastern Europe, one to the South Pacific, one to Western Europe and one to the Arab states. Such a distribution would have omitted any representation of the Commonwealth as such, and Commonwealth members would in that case be elected only as representatives of the geographical region to which they belonged. In the actual election there was a contest between Canada and Australia and the former withdrew.[4] Dr. Evatt of Australia asserted that the major Powers had lobbied on behalf of Canada, but that the lobby had been thwarted by the actual result. He pointed out that, if the geographical reference in Article 23 were to be satisfied, there was no reason why both Canada and Australia should not be elected together. That this statement by the Australian representative had some foundation is indicated by the attitudes of France and China. France declared that she preserved her future freedom of action, while China pointed out that some states were members of a group, but not of a region, with others members of a region, but not of a group. If the filling of vacancies were preordained, some states would be permanently excluded.

The first elections for the Security Council resulted in two seats for Latin America, one for the British Commonwealth, one for Eastern Europe, one for Western Europe and one for the Middle East. In 1946, when Egypt, Mexico and the Netherlands resigned, this distribution was preserved by electing Syria, Colombia and Belgium in their stead.

---

[4] "As a result of this experience, Commonwealth governments tried thereafter, not always successfully, to avoid competing with one another, and canvassed in advance the choice of a candidate," Soward and McInnis, *Canada and the United Nations* (1956), p. 40.

At the next election, however, things did not go so smoothly. Canada and Argentina were elected without difficulty in place of Australia and Brazil, but it was only after eleven ballots that India withdrew from a contest with the Ukraine for the remaining seat which had been vacated by Poland. It is true that this meant that Eastern Europe was still represented in the Security Council, but that, since Australia was no longer a member, the Pacific region was now unrepresented. On the other hand, the Soviet delegate pointed out that the Commonwealth was already represented by the United Kingdom and Canada, and, if India were accepted, Poland would not be "replaced by anybody." If Vyshinsky's view of the distribution of non-permanent seats was correct, it would mean that the Pacific area could be only represented by, in addition to China, one of the Pacific members of the Commonwealth. Should the latter be succeeded by either Canada or the Union of South Africa —in fact, this state has never been elected—it would mean that China alone could purport to represent Pacific interests. It was in connection with this contest between India and the Ukraine, that the first hints of a "gentlemen's agreement" with regard to the non-permanent members of the Council were heard. It was alleged that by this agreement there must always be two Latin American, one East European, one West European, one Middle Eastern and one Commonwealth member of the Council. Whether such an agreement actually existed or not, it is interesting to note that in all subsequent elections of non-permanent members, this distribution has been observed in so far as Latin America, the Commonwealth, Western Europe and the Middle East have been concerned.

It is true that there have been differences of opinion as to how the Middle Eastern member should be chosen. The members of the Arab League seem to have assumed that, as with the selection of Latin American members of the League Council, the representative of each group should in fact be the nominee of the members of the group. In 1948, Egypt, which had ceased to be a member of the Council in 1946, was standing for the seat vacated by Syria. This seat was, however, contested by Turkey and the delegate of the United Kingdom intimated that it was his intention to support Turkey so as to avoid any possibility of the Middle Eastern seat coming to be regarded as a preserve of the Arab states. In fact, after four votes, Egypt was elected. On the termination of Egypt's membership in 1950, Turkey again stood as a candidate for one of the vacant seats. On this occasion, the Arab nominee was the Lebanon and after thirteen ballots Egypt proposed that the General Assembly adjourn in order to enable the Arab states to confer on the situation.[5] After the adjournment, the Lebanon announced the withdrawal of her candidature on the ground that Turkey's election would be in accordance with equitable geographical distribution. Clearly, therefore, the majority of the Assembly, including the Arab states, were of opinion that Turkey was a Middle Eastern state. Since that election, there has been no contest among applicants for this particular seat. It is certain, however, that, so long as the present practice continues, Israel, which is geographically in this region, cannot hope to be elected to the relevant vacancy.

The impact of the Cold War has wrought havoc with any idea that the Eastern European seat might be the perquisite of the Soviet group of states. This first became clear in 1949, not long after the rift had occurred between the Soviet Union and Yugoslavia. When the term of membership of the Ukraine terminated, a contest ensued between Czechoslovakia, representing Eastern Europe in the political sense of that term, and Yugoslavia, a former member of this political group, but now only geographically a part of Eastern Europe. In this election, the United Kingdom supported Czechoslovakia and the United States was active on behalf of Yugoslavia. Mr. Acheson adopted more or less the same reasoning as had the United Kingdom in the Turco-Lebanese contest, for the United States could not agree that the Soviet Union should nominate the candidate from Eastern Europe. Yugoslavia was elected and, in 1951, Greece defeated Byelorussia on the twentieth vote. While it could be argued that both Greece and Yugoslavia were Eastern European states, this contention was not quite so easy in 1953. Poland was the nominee of political Eastern Europe, while Turkey, which had only two years earlier been the member for the Middle

---

[5] See Study Group of Egyptian Society of International Law, *Egypt and the United Nations* (1957), p. 136, for resolution of Arab League Council, September 1953, favouring replacement of Lebanon by Iraq—in fact Iran succeeded.

East, was the champion of those who maintained a geographical interpretation of the term and was elected. Turkey may be considered, depending on the terms of reference selected, as being geographically in both Eastern Europe and the Middle East, but in view of the elections in 1948 and 1950 it is a little difficult to appreciate how this state may properly be considered as the representative of Eastern Europe.

By the election of 1955 the membership of the United Nations had been greatly increased and this increase had shifted the balance of membership in the United Nations from the western to the eastern hemisphere. If the former distribution of non-permanent seats on the Security Council were followed, the non-representation of Asia would be even more marked than it had been in the past. Poland was nominated to succeed Turkey as the representative of Eastern Europe, but Mr. Cabot Lodge announced that, in the view of the United States, Poland did not satisfy the conditions of Article 23 of the Charter, for " Communist Poland is clearly not a nation which has contributed to international peace and security within the meaning of the Charter, or which is in a position to do so."[6] Instead, the United States backed the Philippines, thus making a clear break with any idea that the United States regarded the sixth non-permanent seat on the Council as being the exclusive possession of Eastern Europe in either a political or geographical sense. On the first ballot Poland led, but the Philippines gradually moved ahead, and on the ninth ballot had thirty votes to Poland's one. On this occasion, however, Yugoslavia received twenty-five votes. It was clear that, geographically, many regarded the Philippines as undesirable, while others found Poland politically unpalatable—it was reported that the United Kingdom was supporting the European " intruder." After twenty-nine inconclusive ballots, it was suggested in New York newspapers that this seat should alternate between Eastern Europe and East Asia. As a way out of the deadlock, the President of the General Assembly suggested that he should draw lots as to which of the two leading contestants should sit for the first of two years. The Philippines won, but stood down on condition that she was elected in 1956.

---

[6] *The Times*, October 13, 1955; this, and most of the later statements cited, were made in the form of Press releases.

It should, perhaps, here be recalled that the World Court, in another connection, pointed out that where the Charter lays down specific conditions, these do not "represent only an indispensable minimum, in the sense that political considerations could be superimposed upon them. . . . If the authors of the Charter had meant to leave members free to import . . . conditions extraneous to the conditions laid down . . . , they would undoubtedly have adopted a different wording."[7] According to the Charter, members are elected to non-permanent seats on the Security Council for two years. Any different period would require an amendment of the Charter in accordance with the procedure laid down in Article 108 or Article 109. There is, however, nothing to prevent a member resigning in mid-term. In such an event, a new member should be elected for the remainder of the term in accordance with Article 23. This would mean that every Member of the United Nations, including new members admitted since the last election, would be entitled to consider the position *de novo* and vote for any candidate it might desire. Further, there is no means in the Charter to persuade a state which has been elected to a seat to resign before its full term of two years has elapsed. On the other hand, as was pointed out by the World Court in its Advisory Opinion on the *International Status of South-West Africa*, unilateral declarations made by a state before such a body as the League of Nations or the United Nations can constitute recognition of obligations "and not a mere indication of the future conduct" of the government concerned.[8] Conduct in deviation of such a declaration would not be a breach of the Charter, but would nevertheless constitute an international tort.

Many states in 1955 regarded the proposed way out of the impasse as undignified and it was strongly contested by the Soviet *bloc* and the Latin Americans, while Australia and New Zealand declined to regard it as binding. France, the United States and the United Kingdom supported it, the last indicating that grave diseases required grave remedies. However, since the Assembly President could not get a two-thirds majority for his suggestion, the issue was again open. Finally, after thirty-six ballots, Yugoslavia was elected. Despite the fact that the President's suggestion had not been accepted, it was generally understood that, in accordance with what *The Times* described as the " gentlemen's agreement " proposed by the President,[9] Yugoslavia would resign at the end of the first year and the Philippines be elected for the remaining year of the term. When there is a *de facto* revision of an international agreement [10] in this way, it is important to ascertain the views of the states alleged to be bound by it. " This agreement . . . was accepted by both the parties primarily concerned, and has the moral backing of the four great Powers "—*The Times* ignored the fact that [Nationalist] China is a permanent member of the Security Council. " Some of the countries which today voted for Yugoslavia have, however, said that they cannot bind their Governments to any future course of action, but there were no explanations of voting after today's result was announced. While there is thus no formal commitment in every case, the indications are that many countries will stand by a compromise which had become the only way out." [11] That this was in fact so, became clear a year later when Yugoslavia resigned and the Philippine Republic was elected on the first ballot. An attempt to put the arrangement into its proper perspective was made by Sir Pierson Dixon: " This solution, on the one hand, is a compromise corresponding to political realities. On the other hand, it safeguards the principle of the geographical distribution of seats on the United Nations councils. Yugoslavia, which never sought this office, deserves our thanks for her resolute defence of the principles involved." [12]

---

[7] *Admission of a State to the United Nations, I.C.J. Reports 1947–48*, p. 57, at pp. 62–63.

[8] *I.C.J. Reports 1950*, p. 128, at p. 135. See also Schwarzenberger, *A Manual of International Law* (1960), pp. 160–161, on unilateral and collective acts.

---

[9] December 21, 1955.

[10] See Schwarzenberger, *Power Politics* (1951), p. 746 *et seq.*, and *op. cit.* (1960), in note 8, above, p. 156.

[11] *The Times*, December 21, 1955.

[12] *Ibid.* (this comment does not appear in the Official Record of the Tenth Session of the General Assembly).

It was perhaps only to be expected that when the single year for which the Philippines had been elected expired, Japan, having been a member of the United Nations for only one year, was elected to a normal term of two years in her place. Czechoslovakia had been nominated, but was defeated on the first ballot. In accordance with normal practice, the other two seats were filled by replacing Canada for Australia and Panama for Cuba.

The problem of the Eastern European—or was it now an Asian?—seat arose again when Japan ceased to be a member in 1959. Both Turkey and Poland contested this seat. On this occasion there was apparently no anxiety to see Asia represented. After there had been forty-three ballots, it was again suggested that the term should be split between the two contestants. This proposition was not, at first, acceptable to Poland, but several countries which had supported her candidature throughout " have now made it clear to the Polish delegation that they consider their moral obligation has been discharged, and that, if Poland continues to refuse to split the term of office when the voting is resumed, they will consider themselves free to vote for Turkey."[13] At the fifty-second ballot it was announced by the President of the General Assembly that Poland was the only candidate " at this time," and " the resignation of Poland . . . will become effective on December 31, 1960. . . . A new election will take place for the filling of the non-permanent place on the Security Council on the basis of the agreement [that has been evolved]. . . . In participating in the vote, it is understood that the Members of the Assembly will confirm such an agreement. . . . It would follow that Turkey would be the sole candidate to fill the vacancy produced."[14] The Soviet Union announced its support for this proposal, which it regarded as a " temporary arrangement " in no way affecting the Soviet view on geographical distribution of the non-permanent seats. It will not be known until the end of 1960 whether the members of the United Nations consider themselves bound by this arrangement, as they did in connection with Yugoslavia and the Philippines. In fact, " neither Mr. Lodge nor any other Western spokesman committed

---

[13] *The Times*, November 25, 1959.

[14] General Assembly, Fourteenth Session, Doc. A/PV.857, December 12, 1959.

NON-PERMANENT MEMBERS OF THE SECURITY COUNCIL

Election	*Commonwealth*	*Latin America*		*Middle East*	*Western Europe*	*Eastern Europe*
1945	Australia	Brazil	Mexico	Egypt	The Netherlands	Poland
1946			Colombia	Syria	Belgium	
1947	Canada	Argentina				Ukraine (*v.* India)
1948			Cuba	Egypt (*v.* Turkey)	Norway	
1949	India	Ecuador				Yugoslavia (*v.* Czechoslovakia)
1950			Brazil	Turkey (*v.* Lebanon)	The Netherlands	
1951	Pakistan	Chile				Greece (*v.* Byelorussia)
1952			Colombia	Lebanon	Denmark	
1953	New Zealand	Brazil				Turkey (*v.* Poland)
1954			Peru	Iran	Belgium	
1955	Australia	Cuba				Yugoslavia (*v.* Poland)
1956			Colombia	Iraq	Sweden	Philippines
1957	Canada	Panama				Japan (*v.* Czechoslovakia)
1958			Argentina	Tunisia	Italy	
1959	Ceylon	Ecuador				Poland (*v.* Turkey—at this election it was agreed that Poland would serve for one year and that Turkey would succeed to the seat in 1960)

himself on this long-term issue."[15] It will indeed be strange if, when the time comes, it is the Soviet Union who is prepared to accept the "gentlemen's agreement" on this particular occasion, while the Western states, who were responsible for its evolution, reject it.

Is There a Gentlemen's Agreement?

As has already been shown, the first intimation that there might be a gentlemen's agreement concerning the allocation of non-permanent seats in the Security Council came in connection with the 1947 election.[16] The fullest official description of such a "gentlemen's agreement" is in the explanation given of British support for Czechoslovakia as against Yugoslavia in 1949: "There is a convention in the United Nations whereby certain groups of countries get certain seats on the Security Council. . . . The convention is in the nature of a working arrangement which has developed from the practice of the United Nations. Under this arrangement one of the six non-permanent seats on the Security Council has always gone to the British Commonwealth, one to Western Europe, two to Latin America, one to the Middle East and one to Eastern Europe. It has also come to be generally accepted that the candidate supported by these groups of nations should receive general support. There was no specific time when this convention was made. It is a working arrangement which has grown up."[17] Despite the British conviction that "the candidate supported by [a] group of nations should receive general support," the British representative had supported Turkey as against Egypt in 1948.[18]

The agreement seems to have operated in 1947. Vyshinsky contended that the "Slav countries have an indisputable right to have their own representative in the Security Council in addition to the representative of the Soviet Union," and indicated that the Soviet Union considered that it had a pre-emptive right to decide which Slav state should be elected.[19] According to *The Times*, "by the London gentlemen's agreement, this seat in the Security Council should go to Eastern Europe," and the United States was quite prepared to support Czechoslovakia, while denying that the Soviet Union was entitled to stipulate which of her "satellites" should be elected.[20] Mme. Pandit, as the representative of the country contesting the seat, refused to accept, in so far as India was concerned, the arrangement that was reported to have been made by some of the Powers regarding the allocation of the non-permanent seats. Nor would she accept the suggestion that India withdraw in return for a seat on the Economic and Social Council.[21] She asserted that "a distribution of the Council seats by secret diplomacy to which some of the members of the General Assembly are not a party cannot find any support in this body." [22] By 1955 the Government of India had changed its view. After the decision to divide the term between Yugoslavia and the Philippines had been reached, Mr. Menon announced: "My Government . . . cannot in any circumstances violate the London agreement with regard to geographical distribution [and] we cannot commit ourselves to any positions next year." [23]

---

[15] *The Times*, December 14, 1959.

[16] See above, p. 258.

[17] Under-Secretary of State for Foreign Affairs, House of Commons, November 17, 23, 1949, *Hansard*, 5th ser., Vol. 469, col. 2333; Vol. 470, cols. 349–350.

[18] See above, p. 258.

When the Eastern European seat again fell vacant, the Soviet-Yugoslav breach had occurred, and Yugoslavia, described by Mr. Acheson as Eastern European, Slav and Communist,[24] contended with Czechoslovakia for the seat vacated by the Ukraine, the vacancies resulting from the resignation of Argentina and Canada having been filled by Ecuador and India, thus complying with what were understood to be the terms of the gentlemen's agreement reached in London. Vyshinsky again made much of the "tacit gentlemen's agreement which had been consistently applied during the previous elections. . . . There had also been a violation of the firmly established tradition that candidates for non-permanent membership were always nominated by states belonging to the geographical areas concerned."[25] Unlike the United States, the British delegation, which in 1947 as a loyal member of the Commonwealth had voted for India so long as she was a candidate, supported the Soviet view, questioning the "expediency of breaking the gentlemen's agreement by which the Slav seat on the Council is considered a perquisite of the East European Caucus."[26]

---

[19] Official Records, Second Session, General Assembly, Plenary Meetings, p. 331.

[20] October 2, 21, 1947.

[21] *The Times*, October 2, 1947.

[22] *Loc. cit.*, note 19, above, p. 750.

[23] Official Records, Tenth Session, General Assembly, Plenary Meetings, p. 497.

[24] *The Times*, October 20, 1949.

After 1947, on every occasion when the Eastern European claim was raised, the Soviet delegate referred to the gentlemen's agreement, but without avail. He was not always alone in his view, however. In 1951 Greece was informed of the British intent to support Byelorussia,[27] although Professor Jessup "denied the existence of any so-called 'gentlemen's agreement,' as a hard and fast rule, by which Russia and her allies could have control over the East European seat,"[28] conceding in this way that there was a seat for Eastern Europe. *The Times* correspondent was convinced that "few observers doubt the existence of an unwritten agreement to give the Soviet group control over the East European seat on the Council."[29] Again, in 1953, Vyshinsky referred to the "gentlemen's agreement among the five permanent members of the Security Council, which had been reached in London in 1946" and which had been adhered to for everybody except the Soviet *bloc*.[30] He ignored the fact that if such an agreement existed, it could only have related to the future activities of the Big Five and could not bind those who were not parties to it.

From the analysis given earlier of the 1955 decision to split the term of the sixth member of the Security Council, it is clear that some members of the General Assembly were of opinion that any gentlemen's agreement that there might have been was no longer binding, in view of the voting record of the Soviet Union in the Security Council and of its minions in the General Assembly. Others, however, were not happy at the suggestion, no matter how urgent it might be that the Asian members be represented, that the

[25] Official Records, Fourth Session, General Assembly, Plenary Meetings, p. 103.
[26] *The Times*, October 15, 1949.
[27] *Ibid.* December 10, 1951.
[28] *Ibid.* November 28, 1951.
[29] *Ibid.* November 30, 1951.
[30] General Assembly, Eighth Session, 1953, Press Release, GA 1049.

Eastern European seat should be occupied by a state that was not, at least geographically, part of that region. As usual, the Soviet Union repeated its traditional complaint. The United States supported the Philippines, but it was reported that the United Kingdom and most Commonwealth countries were supporting Yugoslavia.[31] On this occasion, the United States explained its view concerning the alleged gentlemen's agreement. " The gentlemen's agreement . . . was made only to ensure that the elections in the early days of the United Nations were harmonious and it lapsed when the Security Council was seen to be on its feet. Secondly, the East European Governments cannot be said to be serving either peace or security or other United Nations ideals; they should not, therefore, be given preference over others." [32] When the Philippines assumed her seat in 1956, defeating Czechoslovakia which had stood despite the special gentlemen's agreement of 1955, the Soviet Union again denounced the breach of the 1946 agreement.

In 1957, when Japan defeated Czechoslovakia on the first ballot for the seat vacated by the Philippines, the Soviet Union indicated that it, too, was reconsidering the validity of the gentlemen's agreement. After it had become known that Great Britain intended supporting Japan's candidacy, while regarding the other elements of the gentlemen's agreement as remaining valid, Mr. Kuznetsov warned the Commonwealth that " if one group of states begins to violate its obligations towards other states it cannot count on respect on the part of those other states for existing agreements." [33]

At the last election in 1959 matters became almost ludicrous.[34] On this occasion, India regarded the gentlemen's agreement as binding, while, " although ballots are secret, it is believed that Poland has the support of almost all the Afro-Asian *bloc*, and at least part of the British Commonwealth, including India, Canada, Ceylon, Ghana and Malaya [—none of whom can be regarded as a Soviet satellite—], while the supporters of Turkey include most

---

[31] *The Times*, October 15, 1955.

[32] *Ibid*. October 19, 1955.

[33] Press conference, *The Times*, September 28, 1957.

[34] See text to notes 9–12, above.

European countries (except the Scandinavians, Irish and Austrians) and most Latin American countries." [35]

It was not until it was agreed that Poland would be elected in 1960 that a Soviet *bloc* state has been allowed to fill the Eastern European vacancy since the Ukraine had ceased to be a member at the end of 1949. But for the recent compromise, the gentlemen's agreement in so far as the Eastern European seat is concerned would have been observed only in one election, other than that of 1945. This suggests that, whatever may be the view of the Soviet Union, the majority of the members of the General Assembly consider that, though there might be a gentlemen's agreement with regard to the geographical distribution of the non-permanent seats in the Security Council, there is no such agreement for the representation of Eastern Europe in the political sense of that term. Even states which, like the United Kingdom,[36] were at first willing to recognise such an agreement in this sense are at liberty to treat it as a declaration of policy and to exercise their discretion when they regard the situation as having changed. It is no use the Soviet Union and its sympathisers describing this as a breach of the Charter, for there is nothing in the Charter dealing with the matter, other than the reference to geographical distribution and the contribution to the maintenance of international peace and security. While non-observance might, if the agreement were ever intended to be more than a declaration of policy and of intention, amount to a breach of an international undertaking it would not enable any member of the United Nations to refuse to co-operate with a Security Council so elected. In fact, the Soviet Union has shown in the practice of the United Nations that an election in accordance with a two-thirds majority in the Assembly is a valid election, regardless of the particular geographical or other considerations that the members might have had in mind.

Much of the antagonism to the Eastern *bloc* in this matter has been—at least in recent years—occasioned by the prevention by the Soviet Union of an amendment to the Charter to increase the number of seats on the Security Council. The present view of the gentlemen's agreement is perhaps best expressed in a recent written answer to a question in the House of Commons. The Government declared on December 14, 1959: "Her Majesty's Government attach great importance to maintaining the gentlemen's agreement, though we recognise that in practice it has been impossible to observe its application to the Eastern European seat. This has been due to the refusal of the Soviet *bloc* to agree to the expansion of the Security Council to meet the pressure of the growing membership of the United Nations which has resulted in the under-representation of large areas of the world."[37] This makes it clear that the United Kingdom, regardless of whether there is a Labour or Conservative Government in power, recognises that a gentlemen's agreement concerning the distribution of the non-permanent seats in the Security Council does in fact exist. If, however, the United Kingdom or any other state is unwilling to observe the agreement in any particular, it cannot object should the Soviet Union or some other state decline to respect the validity of the agreement in so far as some other region, political or geographical, is concerned—and the Commonwealth can only be a political region.

---

[35] *The Times*, October 13, 1959.

[36] See Goodwin, *Britain and the United Nations* (1957), pp. 241–242.

ARE THERE OTHER GENTLEMEN'S AGREEMENTS?

Where such organs as the Trusteeship Council and the Economic and Social Council are concerned, there appears to have been little dispute as to the distribution of seats,[38] although difficulties did arise in December 1959 in connection with the potential disappearance of France and Italy as administering Powers[39]; but this dispute did not refer to the sort of geographical or political distribution that has been considered so far. However, a similar problem to that in the Security Council has arisen, directly, with the

---

[37] Statement by Minister of State, Foreign Office, *Hansard*, 5th ser., Vol. 615, Written Answers, cols. 93–94.

[38] See Ball, "Bloc Voting in the General Assembly," 5 *International Organisation* (1951), p. 3, at pp. 6–7; see also *The Times*, November 20, 1946.

[39] *The Times*, December 14, 1959.

International Law Commission and, indirectly, with the International Court of Justice.

It is perhaps not to be wondered at that, when the judges of the World Court were first elected, nationals of the five Great Powers were included. This accorded with the requirement in Article 9 of the Statute that "representation of the main forms of civilisation and of the principal legal systems of the world should be assured." The personalities involved satisfied the requirements concerning personal qualification embodied in Article 2 of the Statute. Provided the personal qualifications are maintained, there is, therefore, no ground for criticism in the fact that this representation has been continued.[40] After the election of 1951, when Judge de Visscher failed to secure re-election and the number of Latin American judges increased to four, allegations were made that "bargaining" had taken place and there were suggestions "of forming other regional combinations to offset those in existence."[41]

This situation led to anxious discussion at the Siena session of the Institut de Droit International. In his Report on the Statute of the Court, Judge Guerrero drew attention to the fact that in the days of the Permanent Court of International Justice the practice was to elect purely on the basis of individual merit, and to pay little attention to political or geographical considerations. He deplored the fact that the Press had indicated that in the previous election geographical distribution had been the chief consideration and he feared that this would be the precedent for the future.[42] The Resolution adopted by the Institut was in favour of the complete severance of elections from politics and from the elections for other United Nations organs; it favoured elections taking place immediately after the opening debate in the General Assembly had been completed, and considered that the only communication between the Security Council and the Assembly should concern the results of the respective ballots.[43] The matter came up for further consideration at the following session. Judge Guerrero again maintained that the 1951 election had been merely concerned with the distribution of seats on a regional or continental basis,[44] while Sir Gerald Fitzmaurice pointed out that there is certainly a tendency to interpret Article 9 as envisaging, or at least allowing, a strict geographical distribution. He also considered that the official *pourparlers* which had taken place in relation to the 1951 election clearly showed that the majority of states were strongly attached to a quasi-geographical principle.[45] In its Resolution, the Institut expressed the view that, while it was necessary to maintain a certain geographical distribution in accordance with Article 9, the Court should primarily be elected on the basis of Article 2, and any amendment of the Statute should indicate this.[46] While one has sympathy for those judges and members of the Institut who were concerned at the result of the 1951 election, it is essential to bear in mind a comment made by Huber in his Report to the Aix session. He reminded his colleagues that, if Article 9 had been silent, electoral bodies would still look to the Great Powers, other states and groups of states.[47]

---

[40] For a criticism of the term of office of Judge Golunsky, however, see Eagleton, "Choice of Judges for the International Court of Justice," 47 A.J.I.L. (1953), p. 462, at p. 464.

[41] *Ibid.* p. 463; see also Rosenne, "The International Court and the United Nations," 9 *International Organisation* (1955), p. 244, at pp. 249–251.

[42] 44 (II) *Annuaire de l'Institut* (1952), pp. 442–443.

[43] *Ibid.* p. 474.

The clearest reference to a gentlemen's agreement concerns the distribution of the additional seats on the International Law Commission created in 1956. As a result of the increase in membership of the United Nations, it was felt that fifteen seats did not give sufficient opportunity for full representation of the members of the Organisation on the Commission. During the discussion in the Sixth Committee of the General Assembly on this matter, the Indian delegate pointed out that the existing fifteen seats were occupied by nationals of the five Great Powers, four Latin Americans, three from Western Europe, one from Eastern Europe and two from Asia.[48] He was of opinion that Asia was under-represented, while there was no representation of Africa at all. This is to ignore the fact that the members of the Commission, like the judges, are elected as individuals and not as representatives of particular states or groups of states. Nevertheless, this view received general support and there was a call from the majority of the members of the Committee that there should be a gentlemen's agreement drawn up as to the future distribution of the new seats, of which three should go to Africa and Asia, one each to Eastern and Western Europe, and the sixth to be available for the rest of the world. The Polish delegate pointed out that, while " the manner in which the additional seats were to be distributed could not very well be the subject of a formal agreement, the broad consensus of the delegates should be properly reflected in the Committee's Report." [49] Only the American representative tended to remain aloof from the suggestion that an additional seat should go to Eastern Europe, although he expressed willingness " to vote in favour of additional qualified jurists from Asian and African countries . . . and in favour of another jurist from an Anglo-Saxon country." [50]

---

[44] 45 (I) *Annuaire de l'Institut* (1954), p. 519.

[45] *Ibid.* pp. 442, 508.

[46] *Ibid.* Vol. 45 (II), p. 296.

[47] *Loc. cit.*, note 44, above, p. 414.

[48] Sixth Committee, Official Records, General Assembly, Eleventh Session, p. 11.

The proposal to increase the membership of the Commission to twenty-one was approved unanimously, after the President of the Committee had pointed out that " previous agreements regarding the elections of members or officers of United Nations bodies were a constant practice in the Organisation. Such a binding gentlemen's agreement did not violate the freedom of the elections. The agreement was concluded between the delegations which in fact were the electors. Experience showed that the practice had good results. It was therefore quite in order that the report should confirm the Committee's satisfaction with the allocation of the present fifteen seats on the Commission and refer to the agreement that the additional six vacancies should be distributed in the manner suggested. . . . The first holder of the sixth additional seat would be a Latin American jurist. After five years, his place would be taken by a jurist from a Commonwealth country which did not belong within any other distinct geographical area." [51] It would perhaps be invidious to try to determine which Commonwealth country, other than Canada, Australia and New Zealand, is not in either Asia or Africa. The Report of the Committee [52] reproduced this agreement, the existence of which was expressly drawn to the attention of the Plenary Session of the General Assembly by the Rapporteur.[53] The Report was adopted by the Assembly without discussion, only the Bolivian representative considering it necessary to state that the members of the Commission were elected as individuals and not states, and that it was wrong to draw up regional lists.[54]

---

[49] *Ibid.* p. 16.

[50] *Ibid.* p. 20.

[51] *Ibid.* p. 24.

[52] December 5, 1956, Doc. A/3427, Para. 13.

One further attempt to take advantage of an alleged gentlemen's agreement was made by the Soviet Union in September 1959. At the opening session of the third general conference of the International Atomic Energy Agency, Mr. Novikov claimed that the nomination of the Japanese Ambassador in Vienna as chairman was in breach of an undertaking given some months before that a Bulgarian would be elected. He mentioned that an Austrian had presided over the first conference, a representative of the Afro-Asian group over the second, and that now an Eastern European should be elected, thus preserving the principle that the office of chairman should be distributed geographically.[55] What had happened was that some months before the conference met, the Soviet Union had nominated the Bulgarian, and no one had objected. At the conference itself, Pakistan nominated Japan. The temporary president of the conference conceded that there tended to be an agreement in United Nations circles that vice-presidencies should be distributed in accordance with geography, but there was " no rule which stated that the presidency should be allotted to representatives of different geographical areas in succeeding years." [56]

THE FUTURE

There seems little doubt that, in practice, elections to many of the organs of the United Nations are carried out in accordance with definite understandings whereby seats are allocated to geographical or political groups. For the most part, such gentlemen's agreements, whether called thus or not, are observed. In the Security

---

[53] Official Records, General Assembly, Eleventh Session, p. 728.
[54] *Ibid.* p. 729.
[55] *The Times*, September 23, 1959.
[56] IAEA, Doc. GC (III)/OR. 25, December 4, 1959.

Council, however, where political considerations and cold war realities are of most importance, the gentlemen's agreement has been observed for all regions except Eastern Europe. Recent practice suggests, further, that even those countries which originally accepted the agreement in all its terms have largely abandoned the view that it is operative for Eastern Europe, either in a political or a geographical sense. The most obvious solution would be to amend the Charter in order to increase the number of non-permanent seats and to write into the amendment the exact geographical distribution to be followed. In the absence of such an amendment, it will probably prove more and more common for the sixth seat on the Council to be held for one-year terms only, or for the political group which follows the Soviet lead to be completely unrepresented. So far, no attempt seems to have been made to suggest that, in the present circumstances, one of the two Latin American seats might be used in order to allow the Afro-Asian group to be represented. There seems to be a gentlemen's agreement that Latin American seats on any organ are sacrosanct, a situation which led to the general ill-feeling about elections of judges to the World Court and to the alternation with the Commonwealth of the sixth additional seat in the International Law Commission.

Until some formal arrangement is worked out with regard to the distribution of seats, any observance of a gentlemen's agreement is a matter of policy. In so far as such agreements do exist, any breach of them would not be a breach of the Charter. It might well amount to a breach of a different international obligation, but it is difficult to see what form reparation could take.

REFLECTIONS ON THE LAW OF INTERNATIONAL INSTITUTIONS

Georg Schwarzenberger

The Law of International Institutions is not a synonym for the descriptive treatment or the structural analysis of international institutions. The term has come to stand for a specialised, and largely autonomous, branch of International Law.

As a distinct academic discipline and separate teaching subject, the Law of International Institutions probably came into existence in the University of London in the closing years of the Second World War[1] and has since been introduced in a number of other British and foreign universities. Thus, after an interval of one and a half decades, it is perhaps timely to review the experiment.

A word of warning to the reader who is not a specialist in the Law of International Institutions may be appropriate. On the surface, this essay is suspiciously uncontroversial. It may even justify doubts whether the questions posed are either current or problems. In fact, this paper is very much the product of dissent from positions actually taken by distinguished contemporary writers and from teaching methods in vogue in renowned academic institutions. Thus, the "informed" will have little difficulty in identifying those to whom, for the stimulus they provide, the writer is so greatly indebted. Yet to make apparent in the final version of this paper the application of the Socratic method would have led to a wrong emphasis, for, in Collingwood's terminology, the primary purpose of this paper is not eristic, but dialectic. It is not to show how the subject should *not* be treated, but to provide constructive guidance.[2] Thus, the temptation of enjoyable arguments in a number of directions had to be resisted, possibly at the price of obscuring the controversial and topical character of the essay. Yet this may be all to the good.

---

[1] In broad outlines, the subject is taught in the University of London in undergraduate courses in International Law for the LL.B., B.Sc.(Econ.) and B.A. degrees. It receives a more specialised treatment in the LL.M. and postgraduate Diploma lecture courses and seminars on the Law of International Institutions and on International Economic Law—in the latter with special reference to economic international institutions. See further 4 I.C.L.Q. (1951), p. 306.

I. The Study of International Institutions

The present-day study of international institutions in its legal and non-legal aspects is greatly indebted to a considerable number and variety of earlier experiments. To provide in this paper a consecutive history of the gradual evolution of the subject is neither possible nor necessary.[3] It may, however, be helpful to abstract from the abundant material the most significant patterns of treatment which international institutions have received before the Second World War. They can be summarised under six heads:

(1) The opening stage was characterised by an *unreflective* description of individual international institutions or groups of such institutions. In the nature of things, those which received attention before any others—actually since the seventeenth century—were congresses and conferences. If writers employed any method beyond putting to best use such common sense, humour or wit as they could muster, it was the historical technique of the age, interlaced with refreshingly saucy observations.

De St. Disdier's *Histoire des Negotiations de Nimegue* (1680), the *Works* of Sir William Temple (1720), the reports and letters by Sir Leoline Jenkins (1724) and the anonymous *Histoire des Traités de Paix et autres Negotiations du dix-septième Siècle* (1725) are some outstanding illustrations of this *genre*.

(2) From here it was but one step to a *historical* treatment of international institutions with the full technical and critical apparatus at the disposal of the trained historian.

---

[2] In Chaps. 9–11 of the 4th ed. of the writer's *Manual of International Law*, an attempt has been made to give an exposition of the Law of International Institutions in accordance with the system and the comparative method outlined in this paper. See also under IV below.

[3] See, in particular, J. ter Meulen, *L'Evolution de l'Idée de l'Organisation Internationale* (1917–40); C. Lange, *Histoire de l'Internationalisme* (1910–54), and H. Wehberg, "*L'idée de l'Organisation Internationale à l'époque des Conférences de la Haye,*" in *Études Scellés* (1950), Vol. II, p. 633 *et seq.*

The best that can be attained by this method—and its limitations—is exemplified by works such as (in the chronological order of their subjects) Webster's *Congress of Vienna* (1934), Bourquin's *Histoire de la Sainte Alliance* (1954), Dupuis' *Principe d'Équilibre et le Concert Européen* (1909), Crowe's *Berlin West African Conference, 1884–1885* (1942) and Temperley's *Peace Conference of Paris* (1920–24).

(3) In the *legal* field, classical works such as Lammasch's *Lehre von der Schiedsgerichtsbarkeit* (1914), Schücking's *Werk vom Haag* (1912–17) or Hudson's *Permanent Court of International Justice* (1943) have set exemplary standards for the monographic treatment of the subject. Also a good many dissertations on the highest postgraduate level of the pre-1914 and inter-war periods deserve to be kept in mind as quarries for material in need of re-examination and re-analysis. Yet, the law of international institutions is probably most indebted to some of the textbook writers on international law, for they had to face most consciously the problem of fitting into their own systems the growing number and variety of international institutions.

In retrospect, probably the most perceptive treatment international institutions received in their early days from international lawyers was that given to them by Friedrich von Martens.[4] He was of sufficient stature to view the then nascent international institutions in the light of the international realities and needs of his time. Thus, while not ignoring the fact that international institutions are necessarily the products of the autonomous will of participating States, he did not allow himself to be overwhelmed by this knowledge. He, for one, was not content with merely classifying international institutions together with other "important" types of treaty relations. His special merit lay in recognising the functions of the international institutions of his time as organs of international society.

This approach provides a remarkably elastic framework. All that is needed, as time goes on, is to adjust this scheme so as to let it reflect continuously the needs of an international society that is moving from an unorganised state to one of more conscious, but not necessarily more harmonious, organisation. It was left to the penetrating mind of Alfred Verdross to make the distinction between international law in unorganised and organised international society one of the cornerstones of his own presentation of international law.[5]

---

[4] First published in Russian in 1882–83 (German translation by Bergbohm, Vol. I (1883) and Vol. II (1886)).

(4) Frequently allied with the legal treatment of international institutions was a *radical* and *pacifist* approach to the subject *de lege ferenda*. Even leaving aside the authors of earlier schemes for permanent peace,[6] blue-prints such as those of Jeremy Bentham, William Ladd, Sartorius, Parieu, Lorimer, Bluntschli and, last, but not least, the Emperor of Brazil belong to this category. These projects have in common that their authors regard international institutions as the primary means of approximating international relations to the rule of law within civilised States.

(5) It is necessary to distinguish from the pattern of the self-revealed reformer that of the undisclosed *evangelist* who prefers to leave unstated his major teleological assumptions, but purports to speak *ex cathedra* as lawyer or social scientist. " Faith " in international organisation, a " progressive " attitude towards controversial issues and affirmation of the need for " dedicated " research are some of the hall-marks by which representatives of this approach to the subject can be readily identified.

Coupled with a critical view of existing international institutions, this treatment could do but little harm. In fact, however, it tends to go hand in hand with an *apologetic* attitude towards present-day international institutions. At this point, "*gradualism*," as this treatment has also been termed, is liable to degenerate into an ideology of existing international institutions and their deficiencies.

(6) Finally, the study of International Relations as the branch of Sociology concerned with international society has made its impact on research in the field of international institutions. It has made it possible to supplement essentially descriptive accounts of

---

[5] *Cf. Die Verfassung der Völkerrechtsgemeinschaft* (1926) and the successive editions of *Völkerrecht* (first published in 1937). See also below under III (*Guiding Principles*).

[6] For a helpful recent collection, see H.-J. Schlochauer, *Die Idee des ewigen Friedens* (1953).

international institutions by more penetrating forms of *sociological* analysis of their structure and functions.

II. The Lawyer's Concern

On the surface, there is all the difference between the interest of the practitioner and the academic lawyer in international institutions. Each appears to move on a different plane.

The typical concern of the practitioner, including legal advisers to foreign offices and international institutions, is to construe controversial texts; to steer presiding officers of the organs and committees of particular institutions safely through the shoals of procedural troubles or to instruct delegates in how most effectively to create them; to advise the executives of international institutions on the limits of their discretionary powers and those of member States on the scope of matters still essentially within their domestic jurisdiction; to assist in the harmonious—or imperialist—solution of conflicts of jurisdiction between international institutions and to prepare drafts for new, or the amendment of existing, constitutions.

While the academic lawyer, too, may be expected to be able to perform competently at least the more constructive of these tasks, his own specific work begins where that of the practitioner ends. Beyond exposition and systematisation, his distinct task is to assess critically the impact made on existing international law by individual international institutions, groups of such institutions and the ensemble of international institutions, and to judge the significance of these superstructures in the ever-continuing struggle between the Rule of Force and the Rule of Law in international relations.[7]

---

[7] If the Rule of Law in international relations is to be more than a meaningless synonym for existing international law, but a standard of measurement *de lege ferenda*, it must apply stricter tests than those required for international law on the level of auto-interpretation by its subjects. This does not necessarily imply that the Rule of Law in international relations must be identical with the meaning of this term within national communities (see, for instance, the meaning attached to it by the International Commission of Jurists, 2 *Journal of the I.C.J.* (1959), p. 3, n. 2). It must, however, postulate at least a state in which subjects of international law are automatically accountable to each other before international judicial organs for alleged breaches of international law, and are no longer free to contract at will out of the prevailing international order into the anarchy of the Rule of Force. (See also below under III (4) and text to note 17.)

Even if a practitioner is not preoccupied with more immediate problems, he is severely handicapped in coping publicly with these wider issues of evaluation, and the same applies to academic lawyers with self-imposed commitments of a similar character. It would not only be tactically unwise, but also of questionable taste to represent vested interests—in this respect, international institutions have become as much vested interests as any national or other " establishment "—and, at the same time, use this inside knowledge for the vivisection of one's charges or professional contacts. If lawyers finding themselves in this position are not prepared to accept an apparently no longer self-understood implication of their commitments and to withdraw into dignified silence, they are perforce limited to concerning themselves in public with the brighter side of these topics. Worse still, they may even be tempted to paint their pictures in brighter colours than the subject actually warrants.

The treatment of the judicial practice of the World Court in the literature of international law offers an easily verifiable illustration of this proposition. This thesis at least explains why informed criticism of fallible judgments and opinions remains so much the exception and, in the analysis of this judicial material, exegesis and apologetics are found to be safe and, therefore, favoured techniques.

To make articulate the difficulties which are bound to arise if these functional incompatibilities are ignored is not to propose a rigid separation of theory from practice, but to underline their complementary character. There are sufficient other opportunities for the academic lawyer to keep in touch with practice without jeopardising either his independence or integrity. This is as much a necessity for him as it is in the practitioner's interest to keep abreast with the latest theoretical advances. If nothing else, the practitioner can gain from this contact shortcuts to insights which, otherwise, he may have to acquire by the painful process—painful, if not for him, then at least for his clients—of trial and error. The issues which have given rise to the recent request for an advisory opinion by the International Court of Justice on the question whether the Maritime Safety Committee of the International Maritime Consultative Organisation, elected in January 1959, is constituted in accordance with the constitution of the organisation[8] vividly illustrate this point.

III. THE PLACE OF STUDIES ON INTERNATIONAL INSTITUTIONS IN THE CONTEXT OF INTERNATIONAL LAW

Agreement in the abstract on the test for determining the place of international institutions in the system of international law can be reached without undue difficulty. It is to find a presentation of the subject which reflects faithfully the decisive realities of contemporary international society.[9] Yet, the attempt to settle in less abstract form the nature of these decisive realities is likely to lead to the parting of the ways.

Overriding realities

Seven aspects of international relations appear to determine more decisively than others the structure of contemporary world society:

(1) Present-day world society is bipolarised in two world camps. Centrifugal trends inside each of these camps assist in mitigating temporarily this fundamental cleavage.

(2) In each of the world camps, power tends to become increasingly concentrated in one or a few hegemonial powers.

(3) The post-1945 armaments race has led to a point of relative saturation. The leading Powers in both camps realise that the price of nuclear warfare is co-extermination of the chief centres of civilisation on either side. So long as this phase of nuclear stalemate lasts, the political weight of non-committed States is considerably larger than their *potentiel de guerre* in terms of pre-nuclear calculations.

(4) The United Nations is constitutionally incapable of providing more than an international quasi-order. It stands and falls with

---

[8] *I.C.J. Reports 1959*, p. 267.

To judge by available evidence, an informed and frank study of the deficiencies in the drafting of the constitutions of post-1945 international institutions would be likely to be rewarding.

[9] See, for instance, C. W. Jenks, *The Common Law of Mankind* (1958), p. 23, and C. Rousseau, "*Principes de Droit International Public*," 93 *Hague Recueil* (1958), p. 374.

the willingness of the world Powers not to contract out of it by the use of the escape clauses of Articles 27, 51 and 107 of the Charter.

(5) Such modicum of security as exists in a divided world is a reflection of the nuclear stalemate reached between the world camps and the temporary balance between the sectional and antagonistic quasi-orders provided by the world camps.

(6) To obtain an accurate estimate of the significance of functional international institutions as, for instance, the specialised agencies of the United Nations, the limitations of the powers of these institutions appear more significant than the deceptively wide scope of their jurisdiction. Institutions of this type offer improved techniques of international co-operation. Even in relation to members, these activities remain largely optional and as yet hardly indicate any general movement towards international government on a world scale.

(7) Supra-national institutions, such as the three Communities of "Little Europe," represent the highest form of international integration so far reached. Yet, like territorial federations, this functional variant of federalism is a constitutional experience which reflects the needs of but limited sectors of contemporary world society.[10]

Guiding principles

If, by and large, this analysis of the decisive realities of contemporary world society is correct, it suggests three guiding principles for the treatment of international institutions in the context of mid-twentieth century international law:

(1) So long as the international quasi-order of the United Nations remains as precarious as, so far, it has proved to be, the rules governing the fundamental principles of international customary law must remain both the starting-point and focus of any realistic system of international law. Compared with more ambitious and ephemeral superstructures of the past on a consensual

---

[10] For further discussion of these and other controversial points, *cf. loc. cit.* in note 2, above.

basis, the rules of international customary law have shown a remarkable degree both of stability and elasticity.

(2) The differences in the degree of international integration attained inside, and between, the world camps make it necessary to search for a presentation of the subject which will give a fair picture of international law as applied on each of these levels.

One of the consequences and attractions of such a presentation of the subject is that it brings out the relativity of truth in a whole collection of fashionable, but somewhat sweeping, assertions. Several come immediately to mind: independence having been replaced by interdependence; hegemony having given way to "sovereign equality"; the individual having been transformed from an object into a subject of international law; hypotheses such as the prohibition of the abuse of rights or *ex injuria jus non oritur* having become integral parts of international law at large.

(3) The systematic arrangement of the law of international institutions must, above all else, beware of teleological value-judgments which are rationally unverifiable. It may be that international society is on the march towards a world in which States organise themselves increasingly by means of institutions to meet individual and social needs or that it is on the move towards the Rule of Law. Yet, it may also be *en route* towards some other, and less auspicious, destination. However inspiring some of these objectives may be, it would reduce international law to a vehicle of wishful thinking, if not propaganda by way of insinuation, to let these highly impressionist and subjective vistas affect the systematic exposition of international law in general and of the law of international institutions in particular.

Substitution, amalgamation or consolidation?

Two, at first sight, attractive possibilities must be mentioned. The one would be, for all practical purposes, to *substitute* international law on the level of international institutions for international law at large. The other would be to *amalgamate* the presentation of international law on the institutional level with that of international law.

At most, these patterns of substitution and amalgamation reflect the decisive realities inside and on the fringes of, but not between, the world camps. But, in a world society, the degree of integration reached inside, and on the periphery of, the great *blocs* is hardly the decisive criterion. What matters is the relative strength and weakness of the law that links the potentially hostile factions.

Considerations of this nature appear to rule out both the patterns of substitution and amalgamation. They do not, however, exclude the possibility of finding an adequate place for the legal aspects of international organisation in a mid-twentieth century system of international law. Yet, this must be done in a manner which does not sacrifice the decisive realities outlined above to the temptations of wishful thinking and escapism.

In this context, two constitutional aspects of contemporary international organisation are pointers to a commensurate solution of the quandary: the elements of both remarkable unity and diversity in the constitutions of international institutions.

International institutions can claim a double unity. Albeit on a merely consensual basis, they represent what there is of a world quasi-order as well as of competitive orders of a more limited character.[11] Thus, they provide semi-constitutional international frameworks and in this lies their functional unity.

Beyond this, they share three presumptions in favour of their jurisdiction. Each of these has received judicial recognition by the World Court. These are the presumptions: first, in favour of the competence of international institutions of any description to determine the scope of their own jurisdiction; secondly, in favour of the exclusive jurisdiction of international institutions in matters entrusted to them; and, thirdly, in favour of granting to international institutions such implied powers as are indispensable to the proper fulfilment of their functions.

It would probably be overshooting the mark to read more into these propositions than that they are the result of the judicial interpretation of the typical intentions of parties to treaties by which international institutions are constituted. Yet, in the absence of express stipulations to the contrary, members of international institutions must expect international judicial organs to apply these presumptions. Such a state of affairs differs, however, only in degree from one in which these rebuttable presumptions were regarded as part of the body of international customary law; for the rules of international customary law also prevail only in the absence of treaty stipulations to the contrary.

---

[11] For searching observations on these fragmentary orders, *cf.* M. S. McDougal and H. P. Lasswell, "The Identification and Appraisal of Diverse Systems of Public Order," 53 A.J.I.L. (1959), p. 1 *et seq.*

At the same time, the growth of international institutions since the First World War has led to a considerable variety in these consensual superstructures. In addition to the traditional types of comprehensive institutions (confederations such as the League of Nations and United Nations) as well as non-comprehensive international institutions (judicial, administrative and quasi-legislative), a growing number of hybrids between these basic institutional forms have come into existence. They represent new types of international institutions of a universal, regional and sectional character.

This double feature of a remarkable unity and diversity suggests the appropriate place for international institutions in the system of international law. They form a sufficiently distinctive and wide field of studies to make them eligible for treatment as a special branch of international law: the Law of International Institutions. Both in its unity and diversity, this branch of international law is comparable to others which have come to be accepted on a similar footing: international economic law, the law of the sea, and international air law.

The existence of such special branches not only does justice to important and constructive developments in international law, but also fulfils a protective function. It acts as a necessary, although not always effective, brake against the danger of over-specialisation within any of these fields.

Whatever the shortcomings of this treatment, it may probably claim three points in its favour. It emphasises the continuity in the evolution of international law and, thus, provides some immunity against over-estimation of the significance of international institutions. At the same time, it allows for any new developments to be tested without disturbing in any way the exposition of the established portions of international law. Finally, once such a new branch of international law has proved itself, it can easily be consolidated within the system of international law.

IV. THE SYSTEM AND METHODS OF THE LAW OF INTERNATIONAL INSTITUTIONS

It remains to deal with the system and methods of the Law of International Institutions. As in other fields, these, at first glance, dreary subjects cover the most fundamental decisions of scholarship. This perhaps accounts for the strong inhibitions against removing these issues from their habitat in the realm of inarticulate and frequently subconscious major premises of legal thinking.[12]

The explanation of the riddle of such resistance may well be that a specialist's conspectus of his field consists largely of intuitive and impressionist images which, on closer acquaintance with the subject, he tends to regard as axiomatic. If he himself remains largely unconscious of these irrational conditioning factors of his scientific work, he necessarily communicates, as a teacher and writer, these hidden thought-pictures in a form which is as effective as it is unscientific. He conveys his unspoken assumptions by way of insinuation and implication, that is to say, in a manner which secures acceptance without reflection.[13]

Awareness of the irrational aspects of these problems makes it easier to understand the often instinctively strong reaction to the rational discussion of issues of system and methods: a deep-seated anxiety not to be disturbed by conscious thought on these hidden thought-pictures. Whatever the limitation of this interpretation may be, it serves to encourage self-criticism and a resolve to disclose at least one's own relevant major premises.

[12] For a timely survey of some significant trends in the contemporary Doctrine of International Law, *cf.* J. L. Kunz, *El Systema de Derecho Internacional*, in *Estudios Trelles* (1958), p. 87 *et seq.*, or "The Systematic Problem of the Science of International Law," 53 A.J.I.L. (1959), p. 379 *et seq.* See, further, the present writer's "The Province of the Doctrine of International Law," this *Annual*, Vol. 9 (1956), p. 235 *et seq*

[13] The systematic analysis of the literature of international law from this point of view would be more than an enjoyable piece of detective work. It would constitute an essential contribution to a new discipline concerned with *Irrationalia Juris Gentium*.

Systematic premises

If a conscious attempt is made to lay bare the major premises on which the present writer's system of the Law of International Institutions is based, they add up to a seven-point programme:

(1) In the systematic presentation of the law of international institutions, it is necessary to bring out the long lineage of *ad hoc* international institutions, in particular, conferences and arbitration tribunals, in the evolution of international law. This is an effective way of counteracting current illusions on the " novelty " of the subject.

(2) It is necessary to emphasise the limited variety and significance from the point of view of the Rule of Law of the traditional non-comprehensive institutions: judicial, administrative and quasi-legislative.

(3) It ought to be duly explained that the comprehensive international institutions on the confederate level of the post-1919 and post-1945 eras are little more than attempts to combine under one head the three types of non-comprehensive institutions. To drive home this point, comparisons with earlier experiments on the confederate level and the exposition of their constitutional shortcomings are helpful.[14]

(4) Discussion of the scope of the jurisdiction of international institutions must be balanced by due emphasis on the limitations of their powers so as to do full justice to the realities of international institutional life.

(5) It ought to be shown that apparently novel institutions other than supra-national institutions[15] are little more than hybrids between the traditional forms of comprehensive and non-comprehensive international institutions.

These institutions call for classification in a manner that clarifies both the differences in their geographical radius of operation and their real functions. Thus, hybrid international institutions may be conveniently divided into *universal* institutions, *universalist* institutions (*i.e.*, institutions which fall short of, but aim at, universality), *regional* institutions and *sectional* institutions.

---

[14] The classical works on this subject are still Pufendorf's *Gründliche Untersuchung von der Art und Eigenschaft eines Irregulären Staats* (Appendix to *Gründlicher Bericht von dem Zustande des H. R. Reiches Teutscher Nation* (2nd ed., 1715)), p. 715 *et seq.*, and *The Federalist* (Hamilton, Madison and Jay, 1787–88).

[15] See below under (6).

Regional institutions, such as the International Commission for the Northwest Atlantic Fisheries or the Commission for Technical Co-operation in Africa south of the Sahara, are predominantly functional and, therefore, open to all States in the area. Others, however, even if apparently regional in a geographical sense, are sectional because, in fact if not in law, they are directed against identifiable non-member States. This applies as much to the North Atlantic Treaty Organisation as to the Warsaw Treaty Organisation or, in the microcosm of the Near East, to the Arab League.

(6) The particular characteristics of supra-national institutions, in particular their essentially federal character, must be adequately explained.[16]

(7) Finally, room must be found for the exposition of the potentialities which, *de lege ferenda*, international institutions hold out in a world prepared to transform itself from a power-ridden society into an international community inspired by ideals of true good neighbourliness.

Methods

If we dig in the garden, we use a spade. If we search for oil, we employ a rock-drill. In other words, the choice of tools depends on the depth to which we intend to probe. Thus, there is scope for the application of a number of methods side by side with one another. The *historical* and *analytical* methods do not call for any special comment in their application to the Law of International Institutions. A few remarks may, however, be advisable on the application in this field of the remaining four techniques: the descriptive, comparative, critical and relativist methods.

For the exposition of the essentials of an individual institution, the use of the *descriptive* method is frequently sufficient, especially for introductory purposes. If a fair picture of the objects, membership, organisation, scope of jurisdiction and powers of an international institution, its intended duration and the possibilities for the revision of its constitution is provided, this is at least something, although hardly more than any intelligent reader may be expected to achieve himself by attentively perusing the text of the constitution in question. If, however, one institution after another is treated in this manner, the tediousness of this technique and the boredom it produces become painfully apparent.

---

[16] See further note 10, above.

From this point of view, the *comparative* method, although more demanding, is probably preferable. If, for this purpose, international institutions of all types are indiscriminately lumped together, this is likely to produce a comparable state of exhaustion. If, however, these institutions are sufficiently broken down from a functional point of view, the comparative method becomes both instructive and stimulating. It throws into relief the typical legal patterns and their variations in relation to each of the main aspects of international institutions outlined above. Thus, if the comparative treatment is limited to related institutions, it provides categories of thinking and criticism which are equally indispensable for purposes of analysis and drafting and are not otherwise obtainable.

Like any other branch of law, the Law of International Institutions does not exist in a vacuum. It provides normative frameworks for entities which make their own impact on social life and themselves are conditioned by it. Thus, this branch of international law must itself also fulfil social functions of both an active and passive character.

If, for instance, the question of the significance of international institutions from the point of view of the Rule of Law in international relations is raised,[17] the international lawyer tends to take one of three typical attitudes. He may refuse to commit himself in any way and take refuge in the metalegal character of the question. Another not uncommon reaction is to acclaim uncritically any addition to the number and powers of international institutions as constituting an approximation to this goal. Finally, in a manner less escapist than the first, and less emotional than the second approach, a serious effort may be made to find a rationally verifiable answer.

---

[17] See note 7 above.

At this point, the *critical* method comes into its own. As in relation to other problems of evaluation in the field of international law, the inter-disciplinary treatment of international institutions provides the appropriate technique. This means employing for purposes of any needed evaluation the findings of related disciplines, in particular those offered by the discipline of International Relations.[18]

Proposals *de lege ferenda* for the development of international institutions in the style of the nineteenth-century reformers [19] have exposed the Doctrine of international law to the not always unjustified criticism of meddling with politics. To avoid this charge, it is not necessary to withdraw behind the safety curtain of *lex lata*. It is, however, advisable to treat issues of legal planning in a manner less exposed to charges of political partisanship.

In this context, it must be recalled that more than one solution exists for any social problem. In other words, the social engineer or planner is well advised to apply a *relativist* method and be prepared, within reason, to elaborate side by side as many relevant patterns of reform as he is able to conceive.[20] Yet, however creative the legal planner may be, in the end he will find that all his patterns are merely variations of one theme: the limitation of State sovereignty, and they will vary chiefly according to the degree to which it is assumed that such restrictions are acceptable to potential member States.

But this formulation which is so generally used, hides, rather than reveals, what, in any such case, is meant to happen. Any limitation of the jurisdiction of one entity in favour of another means an extension of the latter's jurisdiction. Thus, any limitation, including the undertaking to renounce the exercise of a particular jurisdiction, involves a transfer of jurisdiction. In the last-mentioned case, this is the right to command the non-exercise of the jurisdiction in question. Therefore, whenever jurisdiction is transferred, it is transferred from one person or group of persons to another person or group of persons.[21] Extension of the scope of international institutions means the transfer of jurisdiction from national " élites " and civil services to their international and supranational counterparts. This explains why nothing is as easy as to engender ardent enthusiasm in the abstract for the extension of the Rule of Law in international relations and further international integration but why, otherwise than on regional or sectional levels, words tend to outrun deeds.

---

[18] See *loc. cit.*, note 12 above (1956), p. 250 *et seq.*

[19] See above under I (4).

[20] See further the writer's *Power Politics* (1951), Part Three, and, for the application of this method to international institutions, *loc. cit.*, note 2, above, Chap. 12.

[21] See further this *Annual*, Vol. 10 (1957), p. 264 *et seq.*

TABLE OF CASES

Accinanto, Ltd. *v.* A/S J. Ludwig Mowinckels: The Ocean Liberty 217
Acklam *v.* Sentinel Insurance Co., Ltd. 119
Adamastos Shipping Co., Ltd. *v.* Anglo-Saxon Petroleum Co. 220
Addis *v.* Crocker 176
Adkins *v.* North Metropolitan Tramway Co. 185
Adler *v.* Dickson 176
Admission of a State into the United Nations 261
Agrimpex Hungarian Trading Co. for Agricultural Products *v.* Sociedad Financiera de Biennes Raices S.A. 220, 226
Allison, *Re* 54
American Trading Co. *v.* S.S. Henry Culbreath 217
Angliss & Co. (Australia) Proprietary Ltd. *v.* Peninsular & Oriental Steam Navigation Co. 218
Anticosti Shipping Co. *v.* Viateur St. Amand 216
Ardan Steamship Co., Ltd. *v.* Andrew Weir & Co. 225, 226, 227
Aron & Co. *v.* The Askvin 214
Asylum Case 237
Att.-Gen. *v.* Earl of Lonsdale 171
—— *v.* Gaskill 189
Att.-Gen. for New South Wales *v.* Perpetual Trustee Co. 123

Baker, Ltd. *v.* Medway Building & Supplies, Ltd. 173, 177
Basden's Settlement Trusts, *Re* 52
Bates *v.* Parker 125
Beach *v.* Reed Corrugated Cases, Ltd. 120
Benmax *v.* Austin Motor Co., Ltd. 131
Bill, The 212
Blackwell's Settlement Trusts, *Re* .. 40
Bouzourou *v.* The Ottoman Bank .. 116
Boyd *v.* Cowell 54
Bradburn *v.* G.W. Ry 97
Bradford Third Equitable Benefit Building Society *v.* Borders 177
Brightman & Co. *v.* Bunge y Born Limitada Sociedad 219, 223
British Transport Commission *v.* Gourley 96, 120
Brockbank, *Re* 47
Brocklehurst's Will Trusts, *Re* 55
Bunge y Born *v.* H. A. Brightman & Co. 220, 222
Burgess *v.* Beethoven Electric Equipment, Ltd. 188
Byng's Will Trusts, *Re* 54
Byrd *v.* Nun 185

C., 1958, *Re* 42
C. W. M., 1941, *Re* 42
Cain's Will Trusts, *Re* 55
Camkin's Questions, *Re* 181
Cavanagh *v.* Ulster Weaving Co., Ltd. 131
Central Control Board (Liquor Traffic) *v.* Cannon Brewery Co., Ltd. 161
Chapman *v.* Chapman 40, 41, 42, 43–44, 57
Chapman's Settlement Trust (No. 2), *Re* 53
Chichester Diocesan Board *v.* Simpson 24
Christie *v.* Leachinsky 155
Christmas *v.* General Cleaning Contractors 125
Clement & Johnson *v.* Associated Newspapers 144
Clitheroe's Settlement Trusts, *Re* .. 53, 56, 58
Clouston & Co., Ltd. *v.* Corry 117
Cohen's Will Trusts, *Re* 50, 58
Coles and Ravemshear, *Re* 191
Commission for Railways *v.* Scott .. 123
Commissioners of Customs and Excise *v.* Anco Plant and Machinery Co., Ltd. 180
Constitution of the Maritime Safety Committee 282
Cresta Holdings, Ltd. *v.* Karlin .. 189

D'Andrea *v.* Woods 70
Davie *v.* New Merton Board Mills 112, 113, 114, 173, 177
Deere & Co. *v.* Mississippi Shipping Co., Inc. 215
Derby's Settlement, *Re* 58
Director of Public Prosecutions *v.* Nieser 65, 70, 77–78, 80–84
Donoghue *v.* Huyton U. D. C. ... 176
Downshire's Settled Estates, *Re* .. 40, 45

EASSON *v.* L.N.E. Ry. 130
Eastern Greenland Case 229, 231
Edevain *v.* Cohen 177
Edwards *v.* Levy 116, 117
Esso Petroleum Co., Ltd. *v.* Southport Corporation 130, 172, 175

FALKNER'S SETTLEMENT TRUSTS, *Re* .. 49
Fallon *v.* Calvert 175
Folger & Co. *v.* United Fruit Co. .. 214
Forster's Settlement, *Re* 42, 44
Fowler *v.* Manning 176

GALLAGHER *v.* Balfour, Beatty & Co. 133
Gallo *v.* Brouncker 116
General Cleaning Contractors *v.* Christmas 125, 126
Gonzalez *v.* Nourse 218
Grant *v.* Coverdale 222
Gulf Italia Co. *v.* American Export Lines, Inc. 213
—— *v.* The Exiria 214

HALL *v.* Eve 171
Hambledon's Will Trusts, *Re* ... 46–47
Hawes *v.* Edwards 62
Hess International Corporation *v.* Isthmian Steamship Co. ... 214, 215
Hines & Co. *v.* Porto Rico International Corporation 227
Hobson *v.* Impett 61

INDRAPURA, THE 217
Inland Revenue Commissioners *v.* Hambrook 122, 123
—— *v.* Saunders 54
International Status of South-West Africa 261
Isbrandtsen Co., Inc. *v.* United States 212

JAMES *v.* Radnor C. C. 187
Jones, Ltd. *v.* Green & Co. .. 226, 227
Jones *v.* Manchester Corporation .. 115
Joseph's Will Trusts, *Re* 46, 58

KAY *v.* Field 222
Kisch *v.* Hawes Brothers, Ltd. 173
Ku-Ring-Gai Municipal Council *v.* Att.-Gen. 44

LACY'S SETTLEMENT TRUSTS, *Re* 56
Lancaster Radiators, Ltd. *v.* General Motor Radiator Co., Ltd. 185
Laws *v.* London Chronicle (Indicator Newspapers) Ltd. .. 115, 117, 118, 119
Leaf *v.* International Galleries 171
Leavey & Co., Ltd. *v.* G. H. Hirst & Co., Ltd. 177
Leeds Shipping Co., Ltd. *v.* Société Française Bunge 219
Leslie *v.* Liverpool Corporation ... 176
Levatino *v.* General Steam Navigation Co., Ltd., of Greece 217
Levi W. Ostrander, The 227
Lewis *v.* Carmarthenshire C. C. .. 106
Liberace *v.* Daily Mirror Newspapers, Ltd. 143
Lister *v.* Romford Ice and Cold Storage Co., Ltd. 114, 115
Little *v.* Stevenson & Co. 226, 227
Liversidge *v.* Anderson .. 162, 175, 187
London Graving Dock Co., Ltd. *v.* Horton 125
Lotus, The 237
Loutfi *v.* Czarnikow, Ltd. 177

McCLELLAND *v.* Northern Ireland General Health Services Board .. 119
Mace *v.* R. & H. Green & Silley Weir, Ltd. 126
Mair, *Re* 44
Margaret Lykes, The 213
Matheos (S. S.) *v.* Louis Dreyfus & Co. 223
Matthews *v.* Kuwait Bechtel Corp. 113, 114
Maxine Footwear Co., Ltd. *v.* Canadian Government Merchant Marine, Ltd. 218
Merivale *v.* Carson 140
Middle East Agency *v.* The John B. Waterman 212, 213
Millar *v.* Harper 187
Miller (Shipping) Ltd. *v.* Port of London Authority 181
Minquiers and Ecrehos, Islands of .. 231
Monk *v.* Redwing Aircraft Co., Ltd. 176
Morris *v.* Luton Corp. 130
—— *v.* West Hartlepool Steam Navigation Co., Ltd. 133
Morton *v.* Wm. Dixon, Ltd. 132
Mungoni *v.* Att.-Gen. of Northern Rhodesia 153

NABOB FOOD , LTD. *v.* Cape Corso (Owners) 217
Needler's Settlement Trusts, *Re* ... 53
Needler's Will Trusts, *Re* 36

New, *Re* 41
No. 1 Albemarle Street, *Re* 181

OAKES' SETTLEMENT TRUSTS, *Re* 51
Ore Steamship Corp. *v.* D/S A/S Hassel 214

PAKISTAN *v.* The S.S. Ionian Trader 214
Palmas, Island of 231, 235
Pannell *v.* United States Lines Co. 214
Paris *v.* Stepney B.C. 133
Payne *v.* Railway Executive 97
Payne's Settlement, *Re* 55
Pearlman (Veneers) S.A. (Pty) Ltd. *v.* Bartels 177
Pemsel's Case 23
Phillips *v.* Phillips 176, 186
Phipps *v.* Orthodox Unit Trusts 176
Pinson *v.* Lloyds and National Provincial Foreign Bank, Ltd. 187
Poole's Settlement Trusts, *Re* 50
Powell *v.* Fall 91
Prince *v.* Gregory 176
Proctor *v.* Bacon 116

QUALCAST (WOLVERHAMPTON), LTD. *v.* Haynes 128, 129

R. *v.* Berger 61
—— *v.* Bianchi 65, 67
—— *v.* The Board of Control, *ex p.* Rutty 204
—— *v.* Brooker 62
—— *v.* Davis 75
—— *v.* Dickson and Gray 76
—— *v.* Dolan 71
—— *v.* Dunn, Durnford and Manley 62
—— *v.* Fallows 62
—— *v.* Frampton 67
—— *v.* Garland 61
—— *v.* Gleed 61, 62
—— *v.* Goodspeed 61
—— *v.* Havard 79
—— *v.* Johnson 74
—— *v.* King 71
—— *v.* Klein 68
—— *v.* Kutas and Jerichower 68, 69
—— *v.* Larkin 84
—— *v.* Latimer 83
—— *v.* Leary 62
—— *v.* Martin and Oliver 74
—— *v.* Matthews 73, 74, 75
—— *v.* Middleton 61
—— *v.* Misell, Ringle and Errington 66, 69, 70
R. *v.* New 70
—— *v.* Oakes 81
—— *v.* Orris 61
—— *v.* Parr, Brown, Miller and Holborne 61
—— *v.* Payne 61
—— *v.* Pearson (No. 2) 61
—— *v.* Poulton 74
—— *v.* Prince 81
—— *v.* Richardson 75
—— *v.* Riley 73
—— *v.* Rymes 78
—— *v.* Schweller 69
—— *v.* Snelling 79–80
—— *v.* Villensky 71
—— *v.* White 79
—— *v.* Wiley 62
—— *v.* Wood 75
—— *v.* Woodward 61
Reardon Smith Line, Ltd. *v.* Ministry of Agriculture, Fisheries and Food 220, 222, 223
Reilly *v.* The King 124
Riddle *v.* Riddle 54, 56
Rights of U.S. Nationals in Morocco Case 273
Riordan *v.* War Office 121
Riverstone Meat Co. (Pty) Ltd. *v.* Lancashire Co., Ltd. 113
Roberts' Settlement Trusts, *Re* 53
Rose *v.* Matt 67
Royal Naval and Royal Marine Children's Homes, *Re* 55
Royster *v.* Carey 172
Rubel Bronze & Metal Co. *v.* Vos 117
Rumbold *v.* L. C. C. 186
Ruse *v.* Read 73
Rylands *v.* Fletcher 87, 90, 91, 94

SAUNDERS *v.* Vautier 39, 47
Scott *v.* Musical 96, 130
Shaw *v.* Shaw 171
Shipwrecked Fishermen, *Re* 54
Shordiche-Churchward *v.* Manning 176
Sim *v.* H. J. Heinz & Co., Ltd. 144
Smith *v.* Austin Lifts, Ltd. 124–127
—— *v.* Baker 125, 128
South African Dispatch Line *v.* Owners of the Panamanian Steamship Niki 221, 223
Spain *v.* Arnott 116
Spedding *v.* Fitzpatrick 184, 186
Spurling, Ltd. *v.* Bradshaw 172
Stapley *v.* Gypsum Mines, Ltd. 109
Steed's Will Trusts, *Re* 49, 51, 52
Studebaker Distributors, Ltd. *v.* Charlton Steam Shipping Co., Ltd. 212

Sutherland, Duke of *v.* British Dominions Land Settlement Corporation 189
Sutherland *v.* Stopes 140
Suzuki *v.* Central Argentine Ry., Ltd. 225

TERRELL *v.* Secretary of State for the Colonies 123
Theiss Bros. (Queensland) Pty. Ltd. *v.* Australian Steamships Pty. Ltd. 217
Thomas' Will Trusts, *Re* 55
Thomson *v.* Birkley 186
—— *v.* Thomson 46, 57
Thorp *v.* Holdsworth 185
Thynne *v.* Thynne 177
Tidesley *v.* Harper 177
Transocean Machine Co., Inc. *v.* Oranje Line 218
Trenchard, *Re* 42
Turner *v.* Mason 115
—— *v.* M.G.M. Pictures, Ltd. 141
Turner's Will Trusts, *Re* 50–51, 53
Tweedie Trading Co. *v.* Thomson . 227
2,098 Tons of Coal, *Re* 227
Tyndale's Will Trusts, *Re* 55

UNITED STATES *v.* Coal Cargo of the Franklin County 224
—— *v.* Russian Volunteer Fleet .. 225

VERGOTTIS *v.* William Cory & Son, Ltd. 226

WALKER, *Re* 36
Ward *v.* Lewis 175
Warner *v.* Sampson 173, 185
Waterman S.S. Corporation *v.* United States Smelting, Refining & Mining Co. 212
Weir Hospital, *Re* 26, 29
Whall and Another *v.* Bulman 172
Williams *v.* Port of Liverpool Stevedoring Co. 109
Wilson *v.* Tyneside Window Cleaning Co. 126, 127
Winter *v.* Cardiff R. D. C. 124
Wrightson, *Re* 176

ZANDER & Co. *v.* Mississippi Shipping Co. 219
Zinovieff *v.* British Transport Commission 96

TABLE OF STATUTES

1601 Statute of Charitable Uses (43 Eliz. 1, c. 4) 23
1691 Benefit of Clergy (3 Will. & M., c. 9) 62
1702 Criminal Procedure Act (1 Anne, St. 2, c. 9) 62
1706 Housebreakers Act (5 Anne, c. 31) 62
1717 Piracy Act (4 Geo. 1, c. 11) 62, 63
1782 Criminal Law (22 Geo. 3, c. 58) 62
1804 French Civil Code 91
1812 Charitable Donations Registration Act (52 Geo. 3, c. 102) 32
1827 Larceny Act (7 & 8 Geo. 4, c. 29) 63–65, 66, 67, 78
1843 Libel Act (6 & 7 Vict. c. 96) 137, 138
1845 Libel Act (8 & 9 Vict. c. 75) 137
1853 Charitable Trusts Act (16 & 17 Vict. c. 137) 29, 30
1855 Charitable Trusts Amendment Act (18 & 19 Vict. c. 124) 29
1860 Endowed Schools Act (23 & 24 Vict. c. 11) 29
1861 Larceny Act (24 & 25 Vict. c. 96) 61, 64, 65, 66, 77
1868 Endowed Schools Act (31 & 32 Vict. c. 118) 29
1869–1948 Endowed Schools Acts (32 & 33 Vict. c. 56; 36 & 37 Vict. c. 87; 37 & 38 Vict. c. 87; 38 & 39 Vict. c. 29; 11 & 12 Geo. 6, c. 40) 29
1869 Debtors Act (32 & 33 Vict. c. 62) 69
1873 Supreme Court of Judicature Act (36 & 37 Vict. c. 66) 184
1875 Supreme Court of Judicature Act (38 & 39 Vict. c. 77) 184
1888 Mortmain and Charitable Uses Act (51 & 52 Vict. c. 42) 23
1890 Lunacy Act (53 & 54 Vict. c. 5) 42, 193, 195, 202, 203
1894 Finance Act (57 & 58 Vict. c. 30) 38
1897 Workmen's Compensation Act (60 & 61 Vict. c. 37) 107
1913 Mental Deficiency Act (3 & 4 Geo. 5, c. 28) 192, 202
1916 Larceny Act (6 & 7 Geo. 5, c. 50) 60, 64, 65, 66, 67, 69, 70, 77
Registration of Business Names Act (6 & 7 Geo. 5, c. 58) 68
1920 Emergency Powers Act (10 & 11 Geo. 5, c. 55) 151, 166, 167
1924 Carriage of Goods by Sea Act (14 & 15 Geo. 5, c. 22) 211–219
1925 Settled Land Act (15 & 16 Geo. 5, c. 18) 40, 43, 45–46
Trustee Act (15 & 16 Geo. 5, c. 19) 33, 38, 43–44, 53, 54, 55, 58
Law of Property Act (15 & 16 Geo. 5, c. 20) 42
1925–1945 Workmen's Compensation Acts (15 & 16 Geo. 5, c. 84; 16 & 17 Geo. 5, c. 42; 20 & 21 Geo. 5, c. 29; 21 & 22 Geo. 5, c. 18; 24 & 25 Geo. 5, c. 23; 1 & 2 Geo. 6, c. 27; 3 & 4 Geo. 6, c. 47; 3 & 4 Geo. 6, c. 56; 4 & 5 Geo. 6, c. 39; 6 & 7 Geo. 5, c. 6; 6 & 7 Geo. 6, c. 49; 9 & 10 Geo. 6, c. 16) 91–93
Trustee Act (New South Wales) 44, 54
1928 Property Law Act (Victoria) 25
1930 Mental Treatment Act (20 & 21 Geo. 5, c. 23) 203, 209
Road Traffic Act (20 & 21 Geo. 5, c. 43) 89
Criminal Code (Nyasaland) 155, 156, 157, 167
Criminal Procedure Code (Nyasaland) 154, 157
1935 Trusts Amendment Act (New Zealand) 25
1936 Carriage of Goods by Sea Act (United States) 211, 214
1938 Inheritance (Family Provisions) Act (1 & 2 Geo. 6, c. 45) 37, 181
Conveyancing Act (New South Wales) 25
Factories Act (Northern Ireland) (1 & 2 Geo. 6, c. 23 (N.I.)) 132
1945 Workmen's Compensation Act (*see above under* 1925–1945).
1946 National Insurance (Industrial Injuries) Act (9 & 10 Geo. 6, c. 62) 89
National Insurance Act (9 & 10 Geo. 6, c. 67) 119
National Health Service Act (9 & 10 Geo. 6, c. 81) 27
Automobile Accident Insurance Act (Saskatchewan) 101

1947 Crown Proceedings Act (10 & 11 Geo. 6, c. 44) 172
1948 Endowed Schools Act (*see above under* 1869–1948).
Law Reform (Personal Injuries) Act (11 & 12 Geo. 6, c. 41) 97
1949 Civil Aviation Act (12, 13 & 14 Geo. 6, c. 67) 91
1950 Matrimonial Causes Act (14 Geo. 6, c. 25) 37, 46, 57
1952 Magistrates' Courts Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55) 207
Intestates' Estates Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 64) 37
Defamation Act (15 & 16 Geo. 6 & 1 Eliz. 2, c. 66) 138
1953 Trustee Act (Victoria) 54
1954 Landlord and Tenant Act (2 & 3 Eliz. 2, c. 56) 182
Charitable Trusts (Validation) Act (2 & 3 Eliz. 2, c. 58) 22, 24, 57
1956 Trustee Act (New Zealand) 47, 48, 52, 54
1957 Homicide Act (5 & 6 Eliz. 2, c. 11) 83, 194, 209
Occupiers' Liability Act (5 & 6 Eliz. 2, c. 31) 124
1958 Matrimonial Causes (Property and Maintenance) Act (6 & 7 Eliz. 2, c. 35) 37
Variation of Trusts Act (6 & 7 Eliz. 2, c. 53) 36, 41, 43, 46–59
Finance Act (6 & 7 Eliz. 2, c. 56) 53
1959 Nuclear Installation (Licensing and Insurance) Act (7 & 8 Eliz. 2, c. 46) 88
Fatal Accidents Act (7 & 8 Eliz. 2, c. 65) 97
Mental Health Act (7 & 8 Eliz. 2, c. 72) .. 192, 195–196, 198–207, 209–210

TABLE OF TREATIES

1899 Hague Declaration I 236
1912 Spitzbergen Protocol 235
1919 Paris Convention on the Regulation of Aerial Navigation 228, 229
1924 Brussels Convention relating to the Limitation of Liability of Owners of Seagoing Vessels 211
1944 Chicago Convention on International Civil Aviation 228–254
1945 United Nations Charter 256, 257, 260, 261, 269, 271, 272, 275, 283
1947 Atlantic City Radio Regulations 249
1951 International Sanitary Regulations (WHO Regulations No. 2) 251
1955 Additional International Sanitary Regulations 251
1956 Additional International Sanitary Regulations 251
1958 Geneva Convention on the Continental Shelf 231
1959 Antarctica Treaty 235
Geneva Radio Regulations 248–249
International Telecommunication Convention, Geneva 249

INDEX

Air law, 228–254
Air space, sovereignty, 228–242
Antarctica, 235
Austin, J., 1–21
Austin, Sarah, 1, 16

Bentham, J., 1–3, 12

Carriage of goods by sea, 211–227
Charities, 22–35
Charterparties, 219–227
Cheng, B., vii, 228–254
Civil procedure, 171–181
Collateral benefits, 97–98
Columbia Committee, 98–100, 104, 105, 107
Commonwealth, 148–170, 256–258, 264–265, 268, 273, 275
Compulsory liability insurance, 88–111
Constitutional law, 148–170
Criminal law, 60–84, 146, 206–209
Criminal libel, 146
Crown servants, 121–124
Cy-près doctrine, 25–30

Defamation, 135–147
Devlin Commission, 152–162, 170
Dicey, A. V., 6, 135–136, 140

Earth satellites, 228–254
Embezzlement, 67
Emergency legislation, 148–170
Employer's liability, 112–134
Enterprise liability, 92, 110
Equity, 22–59
Evershed Committee, 178–182

Fair comment, 139–143
False pretences, 68–70
Fault, 87–93, 94, 97–100
Fraudulent conversion, 66
Freedom of speech, 135–147

General denial, 184–186
Gentlemen's agreements, 255–275
Goodhart, A. L., 10–11
Goodman, A., 135–147
Green, L. C., 231, 255–275

Hargrove, B., 192–210
Holland, D. C., 148–170

Industrial accidents, 85–93, 107–111
International Atomic Energy Agency elections, 274
International Civil Aviation Organisation (ICAO), 228–254
International Court of Justice elections, 271–272, 275
International Geophysical Year, 237
International institutions,
  classification, 288–289
  law of, 255–292
International law, 20, 228–292
International Law Commission elections, 272–274, 275
International order and quasi-orders, 282–292
International Rule of Law, 280–292
Interrogatories, 189–190
Ivamy, E. R. H., 211–227

Jacob, I. H., 171–191
Jurisprudence, 1–21

Keeton, G. W., 2, 22–35
Kenya, 165–167

Law reform, 22–35, 84, 85–111, 184–191, 192–194, 291
Law Reform Committee, 49, 56, 57
League of Nations, 255–256, 258, 286
Libel, 135–147
Lloyd, D., 146

Malice, transferred, 83
Master and servant, 112–134
Mens rea, 61, 72–84
Mental health, 192–210
Mercantile law, 211–227
Methodology, 287–292
Mill, John Stuart, 1, 13, 14
Montrose, J. L., vii, 1–21
Moon, territorial claims to, 234–235

Nathan Committee, 22–23, 24, 28, 32, 34

National insurance, 89, 93, 107, 108
Nationality of flightcraft, 243–244
Negligence, 87–93, 113
Newark Committee, 23, 30
Nyasaland emergency, 152–162, 167–170

"Package" defined, 211–214
Pleadings, 171–191
Prevezer, S., 60–84
Pritchard Committee, 22, 32
Procedure by originating summons, 180–183
Protective trusts, 49–53
Psychopath, 197–201

Ratio decidendi, 10–11
Receiving, 60–84
Recent possession, doctrine of, 82
Rhodesia, Northern, 162–165, 167
Road accidents liability, 85, 93–107
Royal Commission on the Law relating to Mental Illness and Mental Deficiency, 192–210

Saskatchewan Automobile Accident Insurance Scheme, 100–107
Schwarzenberger, G., 231, 234, 261, 262, 276–292
Security Council, 255–275
Semi-emergency legislation, 162–167
Shipping law, 211–227
Space law, 228–254
Strict liability, 88–111
Supra-national institutions, 288–289

Torts, 85–111, 113
Trial without pleadings, 178–180
Trusts, 22–59

United Nations, 255–275, 282–283, 286

Waters, D. W. M., 32, 36–59
Webber, G. J., 112–134
Williams, Glanville, 72, 110
Workmen's compensation, 91–92, 99, 109–111
World Health Organisation, 250–251

AB 2 8 MAR 1974

1977-1

1979-1

1980-~~1111~~

1982-11

901